In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-627

CABLE-VISION, INC., a Florida Corporation, and TELE-MEDIA COMPANY OF KEY WEST,
Its Successor in Interest,
Appellants,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a Judgment of the Supreme Court of Florida dismissing their appeal from a decision of the District Court of Appeal of Florida which upheld the constitutionality of a County ordinance authorizing Monroe County to construct and operate a television translator system in competition with the exclusive rights previously granted to Appellants to provide a cable television system. Accordingly, Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions of law are presented.

OPINIONS BELOW

The final declaratory judgment of the Circuit Court for Monroe County, Florida, dated March 12, 1974, holding that the County's authorization of a television translator system was not an unconstitutional legislative impairment of obligations contained in an existing exclusive franchise for a cable television system granted to Appellants is not officially reported and is reprinted as Appendix A hereto. The opinion of the District Court of Appeal of Florida, Third District, affirming in part and reversing in part the Circuit Court is reported at 324 So.2d 149 (1975) and is also reprinted as Appendix B hereto. The orders of the Supreme Court of Florida dismissing Appellants' appeal, dated May 27, 1976, and denying reconsideration, dated July 8, 1976, are reprinted as Appendix C hereto.

JURISDICTIONAL GROUNDS

This is an appeal involving the constitutionality of a County Ordinance of Monroe County, Florida (Ordinance 5-1973) on the grounds that such Ordinance constitutes an impairment of previously existing contract rights contrary to Article I, Section 10, of the Constitution of the United States. The trial court held the County Ordinance valid as not impairing the exclusive cable television system rights previously granted to Appellants. The District Court of Appeal of Florida affirmed the trial court as to that holding, but went further and held that a subsequently enacted statute of the Florida Legislature (Chapter 65-1927, Laws of Florida) converted Cable-Vision's exclusive franchise for a cable television system into a non-exclusive franchise.

Appellants seek to have this Court review the judgment of dismissal of the Supreme Court of Florida, entered on May 27, 1976. The order denying reconsideration was entered July 8, 1976. Notice of Appeal was filed in the Circuit Court in and for Monroe County, Florida, on September 22, 1976, and is reprinted as Appendix D hereto. The time in which to docket an appeal in this matter was extended by this Court on September 27, 1976.

Jurisdiction for review of this appeal is conferred on the Supreme Court of the United States by Title 28, U.S.C. § 1257 (2). The exercise of this Honorable Court's jurisdiction on appeal, where the validity of a statute is questioned on the grounds of being repugnant to the Constitution of the United States, but where the state court has upheld the statute's validity, is sustained by the following cases: *Winters* v. *People of the State of New York*, 333 U.S. 507, 509 (1948); *Bluefield Water Works and Improvement Company* v. *Public Service Commission of the State of West Virginia*, 262 U.S. 684 (1922); *Western Turf Association* v. *Hyman Greenberg*, 204 U.S. 361, 362 (1906). This Court has held that the definition of "statute of any state" as set forth in 28 U.S.C. 1257 (2) encompasses more than simply the laws passed by a state legislature but also includes municipal ordinances such as those involved herein. *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928).

STATUTES INVOLVED

Ordinance 5-1973 of Monroe County, and Chapters 65-1916 and 65-1927, Laws of Florida, are set forth in Appendices E, F and G hereto, respectively.

QUESTIONS PRESENTED

1. Whether an existing exclusive franchise to provide a cable television system for the benefit of viewers in Monroe County, which includes prohibitions against the County granting competitive rights, either directly or indirectly, is legislatively impaired by the subsequent enactment of a County ordinance enabling the County to directly compete with its franchisee by operating a television translator system communicating the same television programs to the same viewers.

2. Whether the Florida District Court of Appeal's ruling that Cable-Vision's exclusive franchise was converted into a non-exclusive franchise by subsequently enacted legislation and that, therefore, County Ordinance would not impair Cable-Vision's franchise—it being non-exclusive—constituted a violation of Cable-Vision's rights against impairment of obligations of contract under Article I, Section 10, of the United States Constitution.

3. Whether a County Ordinance of Monroe County, Ordinance 5-1973, constitutes impairment of previously existing contractual rights granted to the franchisee, Cable-Vision, Inc., by Chapters 65-1916 and 65-1927, Laws of Florida.

STATEMENT OF THE CASE

The facts in this case are not in dispute. On March 9, 1965, Monroe County, Florida, granted Cable-Vision, Inc. an exclusive thirty year franchise to construct, maintain and operate a cable television system for viewers throughout Monroe County. A copy of that franchise is set forth as Appendix H hereto. The franchise granted Cable-Vision exclusive rights and it was agreed that in return for the

benefits it would bring to the viewers in the community, Cable-Vision would not be faced with competition either directly or indirectly from other television systems. Since there was apparently some question as to the County's legal authority to grant franchises, the Florida Legislature, in June of 1965, enacted Chapter 65-1916 authorizing the County to grant cable television franchises and expressly ratified the pre-existing exclusive franchise to Cable-Vision. (Appendix F, Section 5). The enactment specifically prohibited the County from granting any new or additional franchise which would

> ". . . have any undue adverse impact upon or which shall seriously interfere with the primary business purpose, operation or income of any then existing licensee or franchise holder or which shall cause an undue adverse impact upon or seriously limit or restrict the normal or natural growth, development or income . . . of any such existing licensee or franchise holder." (Appendix F, Section 5).

During the same session the Florida Legislature passed Chapter 65-1927, which granted Cable-Vision a State franchise to operate a cable television system throughout Monroe County. (Appendix G). The franchise did not specifically use words of exclusivity, but definitely contained substantially the same prohibitions as contained in Chapter 65-1916 against the County Commissioners granting any new or additional franchise rights which would have an adverse impact on Cable-Vision. (Appendix G, Section 8).[1]

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1. The existence of these two pieces of legislation may be explained by the fact that Chapter 65-1916 is the enactment of a House-introduced bill, while Chapter 65-1927 resulted from the passage of a Senate bill. Both Acts became law on the same day, June 25, 1965.

After eight years the County Commissioners of Monroe County, on May 22, 1973, enacted Ordinance 5-1973, which authorized the County to construct and operate a television translator system[2] which would transmit the same television signals to the area. Cable-Vision, which had provided and still does provide the citizens of Monroe County with television viewing, strenuously objected to the enactment of such an ordinance since the operations of a translator system would adversely impair its exclusive rights. The Attorney General of Florida agreed with the position of Cable-Vision and on May 22, 1973, rendered an opinion to the effect that the enactment of such a County ordinance authorizing the operation of a translator system would unconstitutionally impair the previously granted franchise to Cable-Vision.

In reaction to the Attorney General's Opinion, Appellees, on or about October 3, 1973, filed a complaint in the Circuit Court of Monroe County seeking a declaratory judgment to the effect that the County had the power to authorize, construct and operate television broadcast translator stations and that the construction and operation of such facilities would not infringe on or impair the rights of Cable-Vision under its exclusive franchise.

The Circuit Court, by Order dated March 12, 1974, entered its Final Declaratory Judgment, a copy of which

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2. Television broadcast translator station is defined by Federal Communications Commission Regulations as "A station in the broadcasting service operated for the purpose of retransmitting the signal of a television broadcast station . . . by means of direct frequency conversion and amplification of the incoming signals without significantly altering any characteristic of the incoming signal . . . for the purpose of providing television reception to the general public." 47 CFR 74.701. Rulemaking and legislative activities have been instituted which could permit translators to originate programming and retransmit unlimited distant signals.

is appended hereto in Appendix A. That Court held that Cable-Vision's exclusive franchise from the County was validly ratified by the Florida Legislature by means of Chapter 65-1916, Laws of Florida. It further held that the provisions of Chapter 65-1927 could not be construed as superseding Chapter 65-1916 and thereby converting Cable-Vision's exclusive franchise into a non-exclusive franchise since such a construction would constitute an unconstitutional legislative impairment of an existing contractual right. Nevertheless, the Court concluded that exclusive franchises must be strictly construed, and what Cable-Vision had received "was *not* an exclusive franchise to furnish all forms of television reception, but rather it was an exclusive right to furnish cable television services only." Consequently, the County's authorization of a translator system was held not to be a legislative impairment of an existing contract between the County and Cable-Vision.

On appeal, the District Court of Appeal of Florida, Third District, held that Chapter 65-1927, Laws of Florida, being later enacted, converted Cable-Vision's exclusive franchise into a non-exclusive franchise and that, therefore, the County ordinance could not be construed as impairing any obligations to Cable-Vision under such a non-exclusive grant. Thus, the District Court of Appeal ended up affirming the conclusion of the Circuit Court, but did so by changing the character of the County's obligation to Cable-Vision. Cable-Vision sought appellate review by appeal in the Florida Supreme Court, which granted the motion of Monroe County to dismiss the appeal, and rehearing was denied by the Supreme Court of Florida by its Order dated July 8, 1976. It is from that judgment that this appeal is sought.

How the Federal Questions Were Raised

The constitutional issues presented here were first raised by Appellees in their Complaint in which the County alleged that Ordinance 5-1973 ". . . would not result in an impairment of the franchise of the defendant Cable-Vision, Inc. . . ." In its answer, Cable-Vision asserted that the Ordinance constituted an unconstitutional impairment of previously existing contractual rights. The Circuit Court resolved the constitutional issue by concluding that Appellants' exclusive right to provide cable television service must be strictly construed and would not be impaired by the operation of non-cable translator services. The Court did, however, find that to interpret the second legislative enactment as depriving Cable-Vision of an exclusive franchise for cable television would have the effect of unconstitutionally impairing the obligations of an existing contract.

On appeal the District Court of Appeal addressed these issues saying:

> "The first issue for our consideration is whether Cable-Vision has an exclusive franchise to furnish all forms of television in Monroe County, stemming, not only from the agreement granting the franchise, but from legislative enactments under Chapters 65-1916 and 65-1927, Laws of Florida. If this be so, then the county's resolution to construct, maintain and operate television broadcast translator stations would be invalid because it would violate the terms of such legislative enactments and, in addition, the ordinance would be an unconstitutional impairment of the obligations of an existing contract. *Jarrell* v. *Orlando Transit Co.*, 1936, 123 Fla. 776, 167 So. 664.
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> * * *

> Since Chapter 65-1927 was the last expression of the legislature as far as the franchise enjoyed by the appellant is concerned, and since that act only granted a nonexclusive franchise whereas Chapter 65-1916 sought to grant or ratify an exclusive franchise granted by the appellee, the question arises as to which of the laws is paramount and which should be construed as controlling.
>
> * * *
>
> In view of the fact that Chapter 65-1916 provides for an exclusive franchise and Chapter 65-1927, which came after it, provides for a non-exclusive franchise . . . the franchise itself was not exclusive as to all forms of television reception. The franchise not being exclusive, it follows that the county agreement of 1965, and the legislative enactments do not give Cable-Vision an exclusive franchise. . .
>
> * * *
>
> From the language of Chapter 65-1927, Cable-Vision only has a franchise to operate a cablevision system. Therefore, there can be no prohibition by virtue of the 1965 agreement and Chapters 65-1916 and 65-1927, for the county to construct, operate and maintain television broadcast translator stations. Cable-Vision contends that county ordinance 5-1973, authorizing translator stations is a constitutional impairment of contract. This is not so because the trial court found, after taking testimony, which was uncontroverted, that there was a distinct difference between a cablevision system and the operation of a television broadcast translator system."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Finding of the Florida District Court of Appeal That Cable-Vision's Exclusive Franchise Was Converted Into a Non-Exclusive Franchise As a Consequence of Subsequently Enacted Legislation Deprives Appellants of Their Guarantee Against Impairment of the Obligations of Contract.

To permit the Florida District Court of Appeal's construction to Chapter 65-1927, Laws of Florida, to stand would deprive Appellants of protection against legislative impairment of franchise obligations in violation of Article I, Section 10, of the Constitution of the United States. By construing Chapter 65-1927, Laws of Florida, as converting Appellant's exclusive franchise to provide cable television services into a non-exclusive franchise, the Florida Court has been able to uphold the constitutionality of Monroe County Ordinance 5-1973, which authorizes the County to engage in direct competition with its franchisee in supplying television and other signal distribution services to the citizens of Monroe County. Article I, Section 10, of the Constitution was intended to preserve the principle of the inviolability of contracts against just such legislative interference, whatever form it may assume. *Murray* v. *Charleston*, 96 U.S. 432, 24 L.Ed. 760 (1877).

In order to support its conclusion that the franchise granted to Cable-Vision was non-exclusive—and, therefore, not impaired by the County ordinance—the Florida Court found that a conflict existed between Chapter 65-1916, Laws of Florida, which ratified the exclusive franchise agreement between the County and Cable-Vision, and Chapter 65-1927, Laws of Florida, which granted a state franchise to Cable-Vision, but which omitted the

word "exclusive". Finding such conflict the Court then concluded the "last expression of the legislative will" to be controlling, thereby invalidating the previously granted exclusive franchise and substituting a non-exclusive franchise.

The Court erred in finding Chapter 65-1916 and Chapter 65-1927 to be in conflict. Chapter 65-1916 accomplished two purposes. It gave Monroe County the power to grant franchises for the operation of cable television and similar communication systems and specifically ratified prior agreements in the nature of a franchise. This legislation ratified the County's previously granted exclusive franchise to Cable-Vision.

Chapter 65-1927 in no way attempted to alter the obligations created and ratified by Chapter 65-1916. It simply provided a grant of a state franchise to Cable-Vision which did not employ the specific word "exclusive".[3] The two franchises exist in parallel, and co-exist without conflict.[4] There is no "positive repugnancy" between the Acts. In fact, a reading of the virtually identical provisions of §5, Chapter 65-1916, and of §8, Chapter 65-1927, with their broad protections, can only lead to the conclusion that even in the case of Chapter 65-1927, the Legislature fully intended the grant to be free from any future com-

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3. Although the word "exclusive" was not used, the Legislature imposed broad restrictions upon the County prohibiting it from giving any rights which would in any way compete with Cable-Vision's business—the essential element of an exclusive right.

4. It would appear that separate legislation was introduced in the Florida House and Senate seeking to resolve any question concerning the County's authority to grant a franchise to Cable-Vision. The House approach was ratification of the previously granted exclusive franchise while the Senate approach was a direct State franchise to Cable-Vision. The Florida Legislature, apparently seeing no conflict between the two, passed both the House and Senate versions, and they became law on the same day.

petition. Under the circumstances, where a "positive repugnancy" does not exist, the rule "against repeal by implication" should govern. *State* v. *Board of Public Instruction of Escambia County,* 113 So.2d 368 (S.Ct.Fla., 1959).

If, on the other hand, we presume, as the District Court of Appeal did, that an irreconcilable inconsistency does exist between Chapter 65-1916 and Chapter 65-1927 regarding the exclusiveness of the franchise, then the question becomes whether Cable-Vision's exclusive franchise agreement with the County, as ratified by Chapter 65-1916, is protected against impairment by subsequent legislation by Article I, Section 10, of the United States Constitution. The answer, Appellants submit, is obviously yes, although the Florida District Court of Appeal, relying upon "the last expression of legislative will", failed to even consider the Constitutional implications of that construction.

The exclusive franchise to Cable-Vision is unquestionably a "contract" subject to constitutional protection against legislative impairment. *City of North Las Vegas* v. *Central Tel.,* 460 P.2d 835, 85 Nev. 620 (1969). The issue of whether an executed contract (in this case specifically ratified by the state legislature) can be superseded by subsequent legislative action is strikingly similar to the question presented to the Supreme Court in *Fletcher* v. *Peck,* 6 Cr. 87 (1810) wherein the Supreme Court first interpreted the contract clause. This case involved the question of whether an executed contract in the form of a legislative land grant made by the state itself through its legislature could be rescinded by the state, and the Court held that the state was restrained by the provisions of the contract clause.

It would be hard to imagine a more clear example of impairment of obligations of previously existing contracts

than the one presented here. The principal value of an exclusive franchise is its exclusivity; a law which would convert an exclusive franchise to a non-exclusive franchise not only impairs the obligations of a contract, but totally destroys the value of that contract to Cable-Vision.

When considering this question in this case, the Circuit Court for Monroe County held:

> "The Court is of the view that the provisions of Chapter 65-1927 cannot be construed as superseding the provisions of Chapter 65-1916 for the reason that such a construction would constitute an unconstitutional construction *in that it would be a legislative impairment of an existing contract or right."* (Opinion, Paragraph 3) [Emphasis added].

The District Court of Appeal recognized the existence of this issue, but failed to address it directly. If it had, it would have found, as Appellants submit this Honorable Court must, that construing Chapter 65-1927, Laws of Florida, as superseding Chapter 65-1916 and rescinding Cable-Vision's previously granted exclusive contract is repugnant to the guarantee contained in Article I, Section 10, of the Constitution of the United States.

II. The Obligations Contained in Cable-Vision's Exclusive Franchise to Operate a Cable Television System Including Legislative Prohibitions Against the County Granting Any Competing Rights Are Impaired by the County's Ordinance Authorizing County Construction and Operation of Television Broadcast Translator Stations.

It is essential in any case in which legislative impairment of contract obligations is alleged for the considering court to determine precisely the contractual rights which

are entitled to constitutional protection. In doing so this Court is not bound by the constructions of the courts below but may review for itself the terms of the agreement in order to determine the scope of the rights entitled to constitutional protection from legislative impairment. *Shriver* v. *Woodbine Savings Bank,* 285 U.S. 467 (1932). A thorough analysis compels the conclusion that the bundle of franchise rights held by Appellants is impaired by Monroe County Ordinance 5-1973 authorizing the county to operate television broadcast translator stations.

The March 9, 1965 agreement between Monroe County and Cable-Vision, as ratified by Chapter 65-1916, Laws of Florida, granted to Cable-Vision "an exclusive franchise for the operation of a cable television system in Monroe County, Florida". The term "cable television system" was not defined. Consequently, the courts below gave it a narrow interpretation limiting the the grant of authority to "direct wire reception of television" and concluding that translator services—which do not employ wire but allow the receiver to obtain television signals directly from the air—would not impair the franchise rights. Such a holding is clearly erroneous for a number of reasons.

First of all, the franchise language itself is quite broad as to the services to be performed by Cable-Vision and leads to the inescapable conclusion that more was contemplated by the parties than merely the transmission of television signals by direct wire. Section 1 of the franchise provides as follows:

> "Section 1. Effective upon the date of the execution of this agreement Cable-Vision, Inc., a Florida corporation, be and it is hereby granted for a period of thirty years and any renewals and extensions thereof as authorized by the laws of the State of Florida, the right, privilege, license and/or franchise to furnish

> direct wire reception of television, radio, music, closed circuit programs, signals and services to the inhabitants of the County of Monroe, Florida, or any person, firm or corporation within said county limits: (1) *programs and services originating in Monroe County and elsewhere which consist of either live, transcribed, recorded, film and/or other means,* (2) *programs and services received by wire, microwave, or cable from outside of the county limits of the County of Monroe, Florida,* (3) *programs and services received by relay, and* (4) *by the means of the establishment of a master antennae, utilizing a master control unit and amplifier and relaying the signals and services directly to the subscriber. . .*" [Emphasis supplied].

From the language of this section it becomes clear that the scope of the activities entitled to the protection of exclusivity ranges far beyond the narrow finding of the courts below.

Perhaps even more important in determining the franchise rights entitled to protection against impairment are the broad prohibitions in the ratifying legislation which prohibit the County from doing anything, either directly or indirectly, which would have "any undue adverse impact upon" or "seriously interfere" with the business of the franchise holder. Section 5 of Chapter 65-1916, ratifying the original franchise, states as follows:

> "Section 5. The county commissioners shall not give or grant any new or additional franchise or license rights provided for in this act, which shall tend to lessen or impair the quality or the efficiency of operation of a system or service being offered and used by the inhabitants of Monroe County under an existing franchise or license, or which shall have any undue

adverse impact upon or which shall seriously interfere with the primary business purposes, operation, or income of any then existing licensee or franchise holder, or which shall cause an undue adverse impact upon or seriously limit or restrict the normal or natural growth, development and income, or adaptation to changing circumstances with respect to matters within the ambit of the primary business purpose, operation or income of any such existing licensee or franchise holder, or which shall directly impair or depreciate the value of any property or property right owned by any such existing licensee or franchise holder. The term 'existing licensee or franchise holder' for the purposes of this act shall include those hereafter granted pursuant to this act from and after its effective date, as well as any franchise, license or other agreement in the nature thereof existing at the time of the passage of this act and ratified hereunder."

These prohibitions are part and parcel of the Cable-Vision franchise[5] and demonstrate a very protective approach to Cable-Vision on the part of the Legislature. These prohibitions do not speak only in terms of not franchising other cable television operators, but rather are couched in terms of preventing adverse impact on, serious limitation of and interference with the purpose, operation or income of the existing franchise holder. What could be broader? Nevertheless, the courts below chose to ignore these rights and rely instead upon the narrowest possible construction of the franchise obligations in order to avoid the obvious conclusion that the authorization of translators would have a devastating effect on Cable-Vision's franchise

5. Virtually identical language is contained in the State franchise to Cable-Vision, Chapter 65-1927, Laws of Florida, Section 8.

rights.[6] However, impairment is not a question of degree, but rather, existing obligations of contract are not to be impaired at all. *Ohio State Life Ins. Co.* v. *Clark*, 274 F.2d 771, Cert. denied 363 U.S. 828 (1960).

Although the franchise speaks in terms of not granting new or additional franchises which have the proscribed effect, this language is equally applicable to competing activities by the County itself. The situation here is directly analogous to that in *Vicksburg* v. *Vicksburg Waterworks Company*, 202 U.S. 453, 50 L.Ed. 1102 (1906), in which the City of Vicksburg granted to a water company the exclusive right for a 30-year period to erect and operate a waterworks system and then sought to compete against its grantee by building and operating its own competing system. The Court therein held:

> "It needs no argument to demonstrate, as was pointed out in the Walla Walla case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. *We cannot conceive how the right can be exclusive, and*

6. The Doctrine of Equivalence, recognized in patent law since 1853 is directly analogous to this situation. *Winans* v. *Denmead*, 56 U.S. 330 (1853). Where an unauthorized device employs substantially the same results in substantially the same way, such unauthorized device may be deemed an infringement even though not a single claim of the patent can literally be read in the unauthorized device. *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30 (1929); *Tigreit Industries, Inc.* v. *Standard Industries, Inc.*, 397 U.S. 586 (1970). Clearly, translators produce the same results as cable television and, therefore, under the theory of the Doctrine of Equivalence would "infringe" Cable-Vision's rights.

the city have the right, at the same time, to erect and maintain a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, be shared with another; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned.

* * *

. . . Any other construction seems to us to ignore the language employed, and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion." 50 L.Ed. at 1111, 1112. [Emphasis added].

In the case at bar the franchise granted by the Court is "exclusive" and the *Vicksburg* case, supra, is directly on point and controlling. By granting to Cable-Vision the exclusive right to operate a television system in Monroe County for a fixed period, the County has precluded itself from operating such a system during the term of Cable-Vision's franchise.

Upholding the county's authority to enter the translator business not only impairs the obligations of Cable-Vision's franchise but destroys that contract in its entirety. It is appellants' contention that the Florida courts were in error, and that their decision deprived Appellants of one of the most important protections in the United States Constitution. Furthermore, the questions presented by this appeal are substantial and will have widespread im-

pact throughout the cable television industry. Virtually all cable companies operate under franchises from municipal or county authorities. Most of these franchises, we submit, are couched in terms of cable television rights. If the decision of the Florida court is sustained, then the precedent is established for any franchising body which wants to authorize or engage in a type of television transmission that deviates in the slightest from "direct wire transmission" to totally disregard its previously granted franchise. Such instability in a developing industry cannot be to the benefit of the viewing public or to the cable operators who must invest substantial amounts of capital to bring the viewers the distant signals they desire.

CONCLUSION

For the reasons herein set forth Appellants urge this Court to review on the merits, with briefs and oral argument, the substantial constitutional issues raised by this appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, MICHAEL G. KUSHNICK, one of the attorneys for Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1976, I served copies of the foregoing Jurisdictional Statement on the several parties thereto as follows:

1. On William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

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410 Concord Building, Miami, Florida 33130

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2. On the State of Florida, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

Tom Harris, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol—Department of Legal Affairs
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APPENDIX

APPENDIX A

CAPTION OMITTED

FINAL DECLARATORY JUDGMENT

THIS CAUSE came on to be heard before the Court upon final hearing without a jury upon the issues made by the plaintiffs' Complaint for Declaratory Relief and the Answer and Affirmative Defenses filed on behalf of the defendants.

The Court heard testimony offered on behalf of the plaintiffs and particularly expert testimony as to the difference between a cable vision system and a television broadcast translator station. No testimony was offered by the defendants but various documents were offered and received in evidence from each of the parties.

The facts in this case are not in dispute. The plaintiff on March 9, 1965 granted to the defendant an exclusive 30 year franchise to furnish cable television services throughout Monroe County. Since there was some doubt as to the plaintiffs' authority to grant such a franchise, the Legislature of Florida enacted Chapter 65-1916 which in effect ratified the purported franchise of March 9, 1965 to the defendant, CABLE VISION, INC. At the same session of the Legislature, that body passed Chapter 65-1927, the effect of which was a legislative grant of franchise, non-exclusive in nature, to the defendant. The plaintiffs on May 22, 1973 enacted Ordinance 5-1973 which authorized the plaintiffs to construct and operate television broadcast translator stations.

Based upon the issues raised by the pleadings, the testimony and other evidence presented to the Court and after hearing oral argument from counsel for the respective parties and receiving memoranda of law from counsel for said parties, the Court finds and declares as follows:

1. That the plaintiff, County, did not have authority to enact an ordinance nor to grant an exclusive franchise to the defendant for cable television. The reason for this declaration is the fact that the power to regulate occupations and businesses by licensed franchises is a peculiar attribute of state sovereignty. Therefore absent such authority from the Legislature, the actions of the plaintiff in granting a franchise to the defendant was ultra vires and invalid.

2. That Chapter 65-1916, Laws of Florida 1965, which purported to ratify the prior actions of the plaintiff in granting the defendant an exclusive franchise for cable television was a valid enactment by the Legislature of Florida and legally ratified and confirmed the prior invalid action of the plaintiff in granting a franchise to the defendant. This Court is of the view that the Legislature could retroactively ratify and approve a franchise agreement done without previously conferred authority so long as such legislation was not prohibited by the Constitution of Florida. The Court finds nothing in the Constitution of Florida as it existed in 1965 that prohibited the enactment of Chapter 65-1916, Laws of Florida, 1965.

3. That the inconsistency between Chapter 65-1916 Laws of Florida 1965 and Chapter 65-1927 (which made a direct grant of a non-exclusive franchise by the State to the defendant) is apparent on the face of the two enactments and that any inconsistency between the two should be resolved in favor of the provisions of Chapter 65-1927. The Court is of the view that the provisions of Chapter

65-1927 cannot be construed as superseding the provisions of Chapter 65-1916 for the reason that such a construction would constitute an unconstitutional construction in that it would be a legislative impairment of an existing contract or right.

4. That the plaintiff notwithstanding the existence of a valid franchise may itself engage in the business of furnishing television to its citizens by means of television broadcast translator stations. It should be noted that in 1972 the Home Rule Amendment to the State Constitution granted broad powers to counties, including Monroe, to enact ordinances similar to Ordinance 5-1973 relating to the establishment of translator stations and that such Ordinance is within the ambit of the Home Rule Amendment.

This Court does not construe the franchise agreement to prohibit the plaintiff from furnishing to the citizens of Monroe County television broadcast translator station services. This is based upon the principle that exclusive franchises from a governmental body to a private corporation must be strictly construed. The franchise here provides for "direct wire reception of television" and is silent as to the possible use of translator stations.

The actions of the plaintiff in authorizing a translator system was not a legislative impairment of an existing contract between the defendant and the plaintiff so as to render the authorizing ordinance relating to translator stations unconstitutional. Neither Chapter 65-1916 nor Chapter 65-1927 prohibit the plaintiff from engaging in activities which might impair the quality of or the value of the defendant's franchise but only prohibit the plaintiff from granting new or additional franchises to others. Although there may be the suggestion that implicit in the two chapters is a provision that the plaintiff will not compete, nevertheless such suggestion ignores the well-established

principle that public grants are strictly construed and that nothing should pass to the grantee of such a franchise by implication. The reason behind this rule of construction is that the object and end of all government is to promote the common interests of the people, their recreation, welfare and prosperity and it is never assumed that the governmental authority intended to diminish this power. Governments should never be presumed to surrender this power because the entire community has an interest in preserving it undiminished. The Statutes (Chapter 65-1916 and Chapter 65-1927), the existing ordinance 5-1973 and the franchise agreement disclose that what was given to the defendant was *not* an exclusive franchise to furnish all forms of television reception but rather it was an exclusive right to furnish cable television services only.

5. That the final judgment of the Circuit Court of Leon County, Florida Civil Action No. 70-1397, entitled CABLE VISION, INC., a Florida corporation vs. THE STATE OF FLORIDA, is not res judicata of any of the issues in this cause.

DONE AND ORDERED this 12th day of March, 1974.

/s/ Jame W. Kehoe
Circuit Judge

APPENDIX B

CABLE-VISION, INC., a Florida Corporation,
Appellant,

v.

William A. FREEMAN, Jr., et al.,
Appellees.

No. 74-1408.

District Court of Appeal of Florida,
Third District.

Dec. 9, 1975.

Rehearing Denied Jan. 22, 1976.

The Circuit Court, Monroe County, James Kehoe, J., entered a final declaratory judgment that county had the power to construct and operate television broadcast translator stations, and cable television corporation appealed. The District Court of Appeal, Nathan, J., held that agreement in which county purported to grant exclusive franchise to cable television corporation was ultra vires and invalid, that statute granting corporation a nonexclusive franchise, rather than previously enacted statute ratifying exclusive franchise, was controlling, that corporation only had a franchise to operate a cable television system, that county ordinance authorizing television translator stations was not a constitutional impairment of the franchise contract granted by the county for the operation of the cable television system, that statutes granting corporation franchise did not prohibit the county from constructing and operating any television broadcast translator stations, and that such construction and operation was not precluded by the lack of a valid county purpose.

Affirmed in part and reversed in part.

1. Telecommunications (Key) 449

County ordinance which purported to grant an exclusive franchise to cable television corporation was an ultra vires and invalid ordinance where no state legislation authorized the granting of such exclusive franchise.

2. Licenses (Key) 5

The power to regulate occupations and businesses by licensed franchises is a peculiar attribute of state sovereignty which requires state legislation.

3. Telecommunications (Key) 449

Statute granting nonexclusive franchise to cable television corporation, which was enacted after statute ratifying county's grant of exclusive franchise, was controlling, so that franchise granted to corporation was nonexclusive. Sp.Acts 1965, cc. 65-1916, 65-1927.

4. Statutes (Key) 207

In reconciling inconsistent statutory provisions, any inconsistency should be resolved in favor of the last expression of the legislative will.

5. Telecommunications (Key) 449

Where cable television corporation was granted by statute a nonexclusive franchise to operate only a cable television system, statute did not prohibit county from constructing, operating, and maintaining television broadcast translator stations since a television broadcast translator system is different from a cable television system and since there was no evidence that the operation of translator stations could substantially harm the cable television business. Sp.Acts 1965, cc. 65-1916, 65-1927.

6. Telecommunications (Key) 449

County had the authority under constitutional self-government and under statute to construct, maintain and operate television broadcast translator stations, despite fact that cable television corporation was granted a non-exclusive franchise to operate a cable television station within the county. Sp.Acts 1965, cc. 65-1916, 65-1927; West's F.S.A.Const. art. 8, § 1 et seq.; West's F.S.A. §§ 125.-01, 125.01(1)(f, w), (3)(b).

7. Telecommunications (Key) 16

County was not precluded from constructing, maintaining, and operating television broadcast translator stations for lack of a valid county purpose. West's F.S.A. § 125.01.

8. Counties (Key) 2½

Determination of what is a county purpose may be expressed or implied in the provisions of a county ordinance, and courts will not interfere with such determination unless it has no legal or practical relationship to a valid county purpose.

Madigan, Parker, Gatlin, Truett & Swedmark, Tallahassee, for appellant.

Horton, Perse & Ginsberg, Paul E. Sawyer, Key West, Robert L. Shevin, Atty. Gen., and Tom Harris, Asst. Atty. Gen., Tallahassee, for appellees.

Before PEARSON, HENDRY and NATHAN, JJ.

NATHAN, Judge.

Appellant, Cable-Vision, Inc., brings before this court for review, a final declaratory judgment arising out of a

suit brought in the trial court by the Board of County Commissioners of Monroe County for the purpose of determining the rights of the county to construct and operate television broadcast translator stations.

The facts in this case, and the trial court so found, are not in dispute. The county, on March 9, 1965, granted to Cable-Vision an exclusive 30-year franchise to furnish a cable television system.[1] Apparently, and for good reason, there was some doubt as to the county's authority to grant such a franchise. Consequently, during the 1965 session of the Florida Legislature, Chapter 65-1916 was enacted specifically ratifying the March 9, 1965 franchise.[2]

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1. The Agreement entered into between Monroe County and Cable-Vision, Inc., on March 9, 1965:

* * *

"The County of Monroe, . . . does hereby grant to said Cable-Vision, Inc., an *exclusive franchise* for the operation of a cable television system in Monroe County, Florida, under the following terms and conditions:

Section 1. Effective upon the date of the execution of this Agreement, Cable-Vision, Inc., a Florida Corporation, be, and it is hereby granted for a period of 30 years and any renewals and extensions thereof as authorized by the Laws of the State of Florida, the right, privilege, license, and/or franchise *to furnish direct wire reception of television*, radio, music, closed circuit programs, signals, and services to the inhabitants of the County of Monroe, Florida, or any person, firm or corporation within said county limits . . ." (emphasis added)

2. Chapter 65-1916:

"AN ACT giving to the county commissioners of Monroe County the power to grant franchises or licenses for the establishment, maintenance and operation of community antenna systems, closed circuit or cable television systems, or any other similar communication or distribution systems or services; . . .

* * *

Be It Enacted by the Legislature of the State of Florida:

Section 1. The county commissioners of Monroe county whenever it shall be made to appear to them that the convenience of the public requires the establishment, maintenance and operation within the county of a community antenna system or systems, closed circuit or cable television

(Continued on following page)

At the same session of the Florida Legislature, Chapter 65-1927 was enacted, the effect of which purports to grant a non-exclusive franchise by the State of Florida to Cable-Vision to operate a cable television system in Monroe County for a period of 30 years.[3] The county, on May 22,

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Footnote continued—

system or systems, or any other similar communication or distribution systems or services are hereby given the power to grant by resolution a franchise or license to any company, corporation, partnership or individual . . .

* * *

Section 3. *The county commissioners under the exercise of the power given by this act may grant an exclusive or limited franchise* or license, operating in either a portion or throughout the limits of Monroe county, including municipalities therein. The franchise or license rights contemplated by this act when granted within the purview hereof shall continue in such grantee, or personal representatives, successors, or assigns for the full term granted . . ." (emphasis added)

3. Chapter 65-1927:

* * *

"AN ACT *granting to Cable-Vision, Inc., a Florida corporation, the right, privilege, license and franchise, for a period of thirty (30) years for the operation of a cable television system throughout Monroe county, Florida*, and all municipalities therein, including the furnishing of direct wire reception of television, radio, music, closed circuit programs, signals, and similar services, together with necessary rights to erect and maintain poles, wires, fixtures, towers, amplifiers, electronic equipment, etc., along the streets, alleys, avenues and highways and other public places throughout the county and all municipalities therein; providing the terms and conditions of such franchise; prescribing charges and service rates; providing for taxes; providing for termination and lease of this franchise and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

* * *

Section 2. Cable-Vision, Inc., a Florida corporation, its successors or assigns is granted for a period of thirty (30) years and during the period of any renewals and extensions thereof as may hereafter be authorized, *the right, privilege, license, and franchise to furnish direct wire reception of television, radio, music, closed circuit programs, signals, and services to the inhabitants of Monroe county*, or any person, firm or corporation within said county limits, including the municipalities therein, . . ." (emphasis added)

* * *

1973, enacted Ordinance No. 5-1973 which authorized the county to construct and operate television broadcast translator stations within the county for the purpose of providing direct television reception to its citizens.[4] The trial

---

4. Ordinance No. 5-1973:

* * *

"WHEREAS, the Board of County Commissioners of Monroe County, Florida, have by petition and other means has had called to its attention the unsatisfactory conditions existing in the reception of direct television signals now available to the public in said county, and

WHEREAS, there are no television broadcast stations operating in a close enough proximity to Monroe County to afford any relief from this condition, and

WHEREAS, the Board of County Commissioners of Monroe County, Florida, now has the opportunity to provide the residents of said County with adequate and satisfactory direct television reception through television translator systems, and

WHEREAS, the Board of County Commissioners of Monroe County, Florida feels it should provide its citizens the opportunity to obtain a better life by being more enlightened in the areas of political, cultural, social and educational commentary, available by broader access to the television media, and (emphasis added)

* * *

WHEREAS, the Board of County Commissioners feel that educational television is necessary in the development of the educational and cultural background of the children of the County, and (emphasis added)

WHEREAS, the transmission of television signals for direct reception is regulated by the Federal Communications Commission, and

WHEREAS, the Board of County Commissioners is empowered to obtain the necessary license under Section 74.732 of the Federal Communications Rules and Regulations, Volume 3, dated September, 1972, which would allow the Board of County Commissioners to correct this present denial of direct television service to the people of Monroe County, and (emphasis added)

WHEREAS, the Board of County Commissioners of Monroe County, Florida, are able to finance, install, maintain and operate such a service, and (emphasis added)

WHEREAS, the distance and peculiar geographical features of Monroe County, Florida make it impossible for its citizens to have broad and acceptable direct television reception by any other method, now therefore,

(Continued on following page)

court held that the county had the power to construct and operate television broadcast translator stations. It is from this final declaratory judgment that Cable-Vision appeals.

The first issue for our consideration is whether Cable-Vision has an exclusive franchise to furnish all forms of television in Monroe County, stemming, not only from the agreement granting the franchise, but from legislative enactments under Chapters 65-1916 and 65-1927, Laws of Florida. If this be so, then the county's resolution to construct, maintain and operate television broadcast translator stations would be invalid because it would violate the terms of such legislative enactments and, in addition, the ordinance would be an unconstitutional impairment of the obligations of an existing contract. *Jarrell v. Orlando Transit Co.*, 1936, 123 Fla. 776, 167 So. 664.

Footnote continued—

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA:

Section 1. The Board of County Commissioners of Monroe County, Florida, is hereby authorized and empowered to apply for and obtain the necessary licenses for the operation of television broadcast translator stations in Monroe County, Florida under Section 74.732 of the Federal Communications Rules and Regulations . . . said television broadcast translator stations being defined in Subsection (2) of Section 74.701 of said Federal Communications Rules and Regulations as follows:

(a) Television broadcast translator station. A station in the broadcasting service operated for the purpose of retransmitting the signals of a television broadcast station, another television broadcast translator station, or a television translator relay station, by means of direct frequency conversion and amplification of the incoming signals without significantly altering any characteristic, of the incoming signal other than its frequency and amplitude, for the purpose of providing television reception to the general public.

Section 2. Said Board of County Commissioners is authorized and empowered to expend County monies necessary for the installation of and maintenance of television broadcast translator stations and related towers and buildings." (emphasis added)

* * *

[1-5] Cable-Vision contends that it has an exclusive franchise from the county, and thus the county is barred from competing with Cable-Vision as well as from granting any competing franchises. We disagree. The county's agreement of March 9, 1965, purported to grant an exclusive franchise to Cable-Vision. This was, and obviously was so recognized, an ultra vires and invalid ordinance because, as the trial court declared, the power to regulate occupations and businesses by licensed franchises is a peculiar attribute of state sovereignty which requires state legislation. It would appear that this is why the Florida Legislature enacted Chapter 65-1916 which ratified the exclusive franchise agreement and subsequently enacted Chapter 65-1927 granting to Cable-Vision, by the State of Florida, a non-exclusive franchise. Since Chapter 65-1927 was the last expression of the legislature as far as the franchise enjoyed by the appellant is concerned, and since that act only granted a nonexclusive franchise whereas Chapter 65-1916 sought to grant or ratify an exclusive franchise granted by the appellee, the question arises as to which of the laws is paramount and which should be construed as controlling. The trial judge found that there was an inconsistency between Chapter 65-1916, Laws of Florida, 1965, and Chapter 65-1927. He construed the last expression of the legislature, to-wit: Chapter 65-1927, to be controlling and he did it upon the well recognized proposition of law that any such inconsistency should be resolved in favor of the last expression of the legislative will. In 30 Fla.Jur., Statutes § 210, Irreconcilable Provisions, it is stated:

> "One important general rule in this regard (the reconciliation of inconsistent provisions) is that the last expression of the legislative will is the law, and that, therefore, the last in point of time or order of arrangement prevails. This rule is applicable where the irreconcilable provisions appear in different statutes, or in different provisions of the same statute."

See also: *Johnson v. State*, 1946, 157 Fla. 685, 27 So.2d 276; *Overstreet v. Ty-Tan, Inc.*, Fla.1950, 48 So.2d 158; *State v. Board of Public Instruction of Escambia County*, Fla.1959, 113 So.2d 368; *Sharer v. Hotel Corporation of America*, Fla.1962, 144 So.2d 813. In view of the fact that Chapter 65-1916 provides for an exclusive franchise and Chapter 65-1927, which came after it, provides for a non-exclusive franchise, the court, under the statutory construction applicable, properly concluded that the franchise itself was not exclusive as to all forms of television reception. The franchise not being exclusive, it follows that the county agreement of 1965, and the legislative enactments do not give Cable-Vision an exclusive franchise to operate a cablevision system or a translator system. From the language of Chapter 65-1927, Cable-Vision only has a franchise to operate a cablevision system. Therefore, there can be no prohibition by virtue of the 1965 agreement and Chapters 65-1916 and 65-1927, for the county to construct, operate and maintain television broadcast translator stations. Cable-Vision contends that county ordinance 5-1973, authorizing translator stations is a constitutional impairment of contract. This is not so because the trial court found, after taking testimony, which was uncontroverted, that there was a distinct difference between a cablevision system and the operation of a television broadcast translator system. From the testimony it appears that a cable television system is a direct wire reception of television and a television broadcast translator system is an over-the-air broadcast facility which does not involve wire transmission by picking up television signals from the air for broadcast over the air. Furthermore, while it appears that the operation of translator stations could substantially

harm Cable-Vision's business, there is no evidence in the record to this effect.

[6] Cable-Vision next contends that the county did not have authority to authorize construction and to operate television broadcast translator stations; that Monroe County being a non-chartered county, has its power of self-government from Article VIII, § 1(f) of the 1968 Florida Constitution which provides:

> "(f) Non-charter government. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict."

Cable-Vision contends that such authority to construct and operate television broadcast translator stations is not within one of the powers authorized by Article VIII of the Constitution, supra, and delegated under § 125.01(1)(f), (1)(w) and (3)(b), Fla.Stat., which provide in pertinent part:

> "(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> • • •

> (f) Provide parks, preserves, playgrounds, recreation areas, libraries, museums, historical commissions, and other recreation and cultural facilities and programs;
>
> • • •
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.
>
> • • •
>
> (3)(b) The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the state constitution."

Therefore, it is argued, this county ordinance # 5-1973 is invalid because it is inconsistent with a general or special law, namely Chapter 65-1916 and Chapter 65-1927, Laws of Florida. We disagree. The mere fact that Chapters 65-1916 and 65-1927 grant Cable-Vision a franchise, which we determine to be non-exclusive, to operate a cable television station, does not, in itself, prohibit the county from constructing and operating a television broadcast translator station especially where there is a difference between a cablevision system and a translator system.

Cable-Vision relies on the case of *Davis v. Gronemeyer*, Fla.1971, 251 So.2d 1. However, that case is distinguished from the instant case as there was an attempt by a non-charter county, under home rule, to repeal a special act of the legislature which created a civil service system of county employees contravening a special act of the legislature. Cable-Vision cites the case of *Byers v. Board of Supervisors of the County of San Bernardino*, 262 Cal.

App.2d 148, 68 Cal.Rptr. 548 (1968), which held that where the County Board of Supervisors sought an agreement to establish television broadcast translator stations under a somewhat similar provision of a California County Code, the county had no power or authority to provide translator stations by taxing its citizens. However, the Code involved in the *Byers* case did not include a provision for "recreational and cultural facilities and programs."

[7, 8] The county, in its ordinance # 5-1973, authorizing the Board of County Commissioners of Monroe County to construct and obtain the necessary licenses for the operation of television broadcast translator stations, recites that there are unsatisfactory conditions existing in the reception of direct television signals now available to the public in the county and that no television broadcast stations are operating in close enough proximity to Monroe County to effect any relief from this condition; that the county feels it should provide its citizens with the opportunity to obtain a better life by being more enlightened in the areas of political, cultural, social and educational communication available by broader access to the television media and that television broadcast translator stations provide the only means of receiving and transmitting such communication. Today, counties provide vast cultural and recreational facilities for the welfare of their citizens. Television does have educational programs and is virtually a necessary means of transmitting what is thought to be cultural enlightenment, and the mere fact that Cable-Vision has a franchise for a cable television system should not prevent the citizens of the county from obtaining other types of television service especially where the geographical and economic situation does not adequately provide access to such service. Determination of what is a county purpose may be express or implied in the pro-

visions of the ordinance. The courts will not interfere with such determination unless it has no legal or practical relationship to a valid county purpose. *State v. Brevard County*, 1930, 99 Fla. 226, 126 So. 353, 355.

Since the franchise to Cable-Vision was not exclusive, and there appears to be, in this case, a valid county purpose, the county has the authority, under constitutional self-government and § 125.01, Fla.Stat., to construct, maintain and operate television broadcast translator stations. The declaratory judgment of the trial court is affirmed except as to that part of the judgment which declares that Cable-Vision has an exclusive right to furnish cablevision services.

Affirmed in part and reversed in part.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, 1976

THURSDAY, MAY 27, 1976

CASE NO. 48,962

DISTRICT COURT OF APPEAL, THIRD DISTRICT

74-1408

CABLE-VISION, INC., ETC.,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., ET AL., as and constituting
THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, ETC.,
Appellees.

Upon consideration of the Motion to Dismiss filed by attorneys for appellees and Response thereto, it is ordered that said motion is granted and this appeal be and is hereby dismissed.

OVERTON, C.J., ROBERTS, ADKINS, SUNDBERG AND HATCHETT, JJ., CONCUR
Y

CC: Hon. W. P. Carter, Clerk
Hon. Ralph W. White, Clerk
Hon. James Kehoe, Judge

Hon. Julius F. Parker, Jr.
Hon. Jack M. Skelding, Jr.
Hon. Paul E. Sawyer, Hon.
Mallory H. Horton
Hon. Paul Sawyer
Hon. Tom Harris

IN THE SUPREME COURT OF FLORIDA

JULY TERM, 1976

THURSDAY, JULY 8, 1976

CASE NO. 48,962

CABLE-VISION, INC., ETC.,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., ET AL., as and constituting
THE BOARD OF COUNTY COMMISSIONERS OF
MONROE COUNTY, ETC.,
Appellees.

On consideration of the Petition Under Florida Statutes, Section 59.45 filed by attorneys for appellant and Response thereto,

IT IS ORDERED that said petition is denied.
Y

CC: Hon. W. P. Carter, Clerk
Hon. Ralph W. White, Clerk
Hon. James Kehoe, Judge
Hon. Julius F. Parker, Jr.,
Hon. Jack M. Skelding, Jr.
Hon. Mallory H. Horton,
Hon. Paul E. Sawyer
Hon. Paul E. Sawyer
Hon. Tom Harris

APPENDIX D

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. 73-786-CA-17

CABLE-VISION, INC., a Florida corporation, and TELE-MEDIA COMPANY OF KEY WEST LTD., its successor in interest,

Appellants,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West Ltd., its successor in interest, the Appellants above named, hereby appeal to the Supreme Court of the United States from the Final Judgment of dismissal of appeal entered by the Supreme Court of Florida on May 27, 1976, and denial of rehearing thereon entered by the Supreme Court of Florida on July 8, 1976.

This Appeal is taken pursuant to 28 U. S. C. § 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

1. Complaint for Declaratory Judgment dated October 3, 1973.

2. Motion to Strike and Answer of Cable-Vision, Inc. dated October 24, 1973.

3. Motion to Dismiss dated October 26, 1973.

4. Order dated December 18, 1973.

5. Memorandum of Law of the Attorney General dated February 25, 1974.

6. Memorandum Brief of Defendant, Cable-Vision, Inc. dated February 25, 1974.

7. Reply Memorandum of the Attorney General dated March 4, 1974.

8. Reply Memorandum Brief of Defendant, Cable-Vision, Inc., dated March 7, 1974.

9. Plaintiff's Memorandum dated May 6, 1974.

10. Final Declaratory Judgment dated March 25, 1974.

11. Notice of Appeal dated April 9, 1974.

12. Assignments of Error dated April 15, 1974.

13. Directions to the Clerk dated April 15, 1974.

14. Designations to Court Reporter dated April 15, 1974.

15. Transcript of Testimony of Final Hearing before the Circuit Court of Monroe County.

16. Opinion of Third District Court of Appeal dated December 9, 1975.

17. Petition for Rehearing dated December 22, 1975.

18. Order denying Petition for Rehearing dated January 22, 1976.

19. Notice of Appeal dated February 23, 1976.

20. Assignments of Error dated March 8, 1976.

21. Directions to the Clerk dated March 8, 1976.

22. Order of the Supreme Court of Florida dismissing Appeal dated May 27, 1976.

23. Petition of Cable-Vision, Inc. for Rehearing dated June 1, 1976.

24. Order of the Supreme Court of Florida denying Rehearing dated July 8, 1976.

III. The following questions are presented in this appeal.

1. Whether County Ordinance 5-1973 of Monroe County impairs the obligations of a previously existing contract, when the County has granted an exclusive franchise for cable-television services to Cable-Vision, Inc., and later passes an Ordinance authorizing the County to compete with its franchisee by constructing and operating translator stations financed by tax dollars.

2. Whether an act of the Florida Legislature impairs the obligations of previously existing contractual rights where a Florida Statute (Chapter 65-1916, Laws of Florida) ratified an exclusive franchise granted by Monroe County to Cable-Vision, Inc., and a later act of the Legislature (Chapter 65-1927, Laws of Florida), purports to grant a non-exclusive franchise directly from the State of Florida to the same franchisee. The District Court of Appeal for the Third District of Florida held that Chapter

65-1927, Laws of Florida superseded Chapter 65-1916, Laws of Florida, to the extent of converting an exclusive franchise to a non-exclusive franchise.

3. Whether a County Ordinance of Monroe County, Ordinance 5-1973, constitutes impairment of previously existing contractual rights granted to the franchisee, Cable-Vision, Inc., by Chapters 65-1916 and 65-1927, Laws of Florida.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Truett
& Swedmark
P. O. Box 669—318 N. Monroe Street
Tallahassee, Florida 32302
Attorneys for Appellants, Cable-Vision, Inc. and Telemedia Company of Key West

PROOF OF SERVICE

I, JULIUS F. PARKER, JR., one of the attorneys for Cable-Vision, Inc., a Florida corporation, and Telemedia Company of Key West, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of September, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

1. On William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, by mailing a copy in a duly addressed envelope, with first

class postage prepaid, to their attorneys of record as follows:

Mallory Horton, Esquire, Horton and Perse
410 Concord Building, Miami, Florida 33130

Paul E. Sawyer, County Attorney for Monroe County
P. O. Box 571, Key West, Florida 33040

2. On the State of Florida, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Tom Harris, Esquire, Assistant Attorney General, Department of Legal Affairs, Civil Division, 222 West Pensacola Street, Tallahassee, Florida 32304.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Truett
& Swedmark
P. O. Box 669—318 N. Monroe Street
Tallahassee, Florida 32302
Attorneys for Appellants, Cable-Vision, Inc. and Telemedia Company of Key West

APPENDIX E

ORDINANCE NO. 5-1973

AN ORDINANCE RELATING TO MONROE COUNTY, FLORIDA; AUTHORIZING AND EMPOWERING THE BOARD OF COUNTY COMMISSIONERS OF SAID COUNTY TO APPLY FOR AND OBTAIN LICENSES FOR OPERATING TELEVISION BROADCAST TRANSLATOR STATIONS IN SAID COUNTY UNDER SECTION 74.732 FEDERAL COMMUNICATIONS RULES AND REGULATIONS, VOLUME 3, DATED SEPTEMBER, 1972 IN SAID COUNTY AND DEFINING TELEVISION BROADCAST TRANSLATOR STATIONS; AUTHORIZING SAID BOARD OF COUNTY COMMISSIONERS TO EXPEND MONIES NECESSARY FOR THE INSTALLATION AND MAINTENANCE OF TELEVISION BROADCAST TRANSLATOR STATIONS AND RELATED TOWERS AND BUILDINGS; EMPOWERING SAID BOARD OF COUNTY COMMISSIONERS TO PURCHASE OR LEASE LANDS NECESSARY FOR THE ERECTION OF SAID TELEVISION BROADCAST TRANSLATOR STATIONS AND TO ENTER INTO LEASE-PURCHASE, LEASE OR PURCHASE AGREEMENTS TO OBTAIN FEDERAL LICENSES FOR OPERATION OF SAID TELEVISION BROADCAST TRANSLATOR STATIONS; AUTHORIZING AND EMPOWERING SAID BOARD OF COUNTY COMMISSIONERS TO HIRE BY CONTRACT OR EMPLOY TECHNICAL CONSULTANTS AND ENGINEERS NECESSARY TO INSTALL AND OPERATE SAID TELEVISION BROADCAST TRANSLATOR STATIONS; AUTHORIZING AND EMPOWERING THE MAYOR AND CHAIRMAN AND

THE CLERK OF SAID BOARD TO SIGN ALL DOCUMENTS, INCLUDING WARRANTS FOR THE EXPENDITURES OF MONEY NECESSARY, REQUIRED UNDER THIS ORDINANCE; REQUIRING PROVISIONS OF THIS ORDINANCE TO BE LIBERALLY CONSTRUED; REPEALING ALL ORDINANCES, RESOLUTIONS, RULES AND REGULATIONS IN CONFLICT WITH THIS ORDINANCE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Board of County Commissioners of Monroe County, Florida, have by petition and other means has had called to its attention the unsatisfactory conditions existing in the reception of direct television signals now available to the public in said County, and

WHEREAS, there are no television broadcast stations operating in a close enough proximity to Monroe County to afford any relief from this condition, and

WHEREAS, the Board of County Commissioners of Monroe County, Florida, now has the opportunity to provide the residents of said County with adequate and satisfactory direct television reception through television translator systems, and

WHEREAS, the Board of County Commissioners of Monroe County, Florida feels it should provide its citizens the opportunity to obtain a better life by being more enlightened in the areas of political, cultural, social and educational commentary, available by broader access to the television media, and

WHEREAS, that part of Monroe County, Florida which consists of the Florida Keys is more than 120 miles in length from the County seat in Key West to the County line and its citizens and visitors are scattered throughout the islands which constitute this land area, and

WHEREAS, television broadcast translator stations provide the only means by which signals broadcast by television stations outside of our receiving area may be re-transmitted to areas in which direct reception of such television broadcast signals are now denied because of distance, and

WHEREAS, the Board of County Commissioners feel that educational television is necessary in the development of the educational and cultural background of the children of the County, and

WHEREAS, the transmission of television signals for direct reception is regulated by the Federal Communications Commission, and

WHEREAS, the Board of County Commissioners is empowered to obtain the necessary license under Section 74.732 of the Federal Communications Rules and Regulations, Volume 3, dated September, 1972, which would allow the Board of County Commissioners to correct this present denial of direct television service to the people of Monroe County, and

WHEREAS, the Board of County Commissioners of Monroe County, Florida, are able to finance, install, maintain and operate such a service, and

WHEREAS, the distance and peculiar geographical features of Monroe County, Florida make it impossible for its citizens to have broad and acceptable direct television reception by any other method, now therefore,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA:

Section 1. The Board of County Commissioners of Monroe County, Florida is hereby authorized and empowered to apply for and obtain the necessary licenses for the operation of television broadcast translator stations in Mon-

roe County, Florida under Section 74.732 of the Federal Communications Rules and Regulations, Volume 3, dated September, 1972, in Monroe County, Florida, said television broadcast translator stations being defined in Subsection (a) of Section 74.701 of said Federal Communications Rules and Regulations as follows:

(a) Television broadcast translator station. A station in the broadcasting service operated for the purpose of retransmitting the signals of a television broadcast station, another television broadcast translator station, or a television translator relay station, by means of direct frequency conversion and amplification of the incoming signals without significantly altering any characteristic, of the incoming signal other than its frequency and amplitude, for the purpose of providing television reception to the general public.

Section 2. Said Board of County Commissioners is authorized and empowered to expend County monies necessary for the installation of and maintenance of television broadcast translator stations and related towers and buildings.

Section 3. Said Board of County Commissioners is empowered to purchase, or lease, any lands necessary for the erection of said television broadcast translator stations and to enter into lease-purchase, lease or purchase agreements for any and all equipment necessary to obtain the proper Federal licenses necessary for the operation of said television broadcast translator stations.

Section 4. In carrying out the provisions of this Ordinance, said Board of County Commissioners is hereby authorized and empowered to hire by contract or employment the necessary technical consultants and engineers to insure the proper and adequate installation and operation

of said television broadcast translator stations in order to provide full, adequate, and satisfactory direct television reception to the citizens of Monroe County, Florida.

Section 5. The Mayor and Chairman and the Clerk of said Board of County Commissioners of Monroe County, Florida, are authorized and empowered to sign any and all documents, including warrants for the expenditures of monies, necessary to carry out the purposes of this Ordinance.

Section 6. The provisions of this Ordinance shall be liberally construed in order to effectively carry out the purposes of this Ordinance in the interest of the public.

Section 7. All Ordinances, Resolutions, rules and regulations in conflict herewith are hereby repealed to the extent of said conflict.

Section 8. After its adoption, this Ordinance shall take effect upon receipt of the official acknowledgment from the Department of State acknowledging receipt of certified copy of this Ordinance and that said Ordinance has been filed in said office.

APPENDIX F

CHAPTER 65-1916

HOUSE BILL NO. 2859

AN ACT giving to the county commissioners of Monroe county the power to grant franchises or licenses for the establishment, maintenance and operation of community antenna systems, closed circuit or cable television systems, or any other similar communication or distribution systems or services; prohibiting munic-

ipalities from granting franchises or licenses in conflict with those granted by the county commissioners; providing a maximum term for such franchises or licenses; providing for renewal of such franchises or licenses at the end of said term; providing for the manner and method of terminating such franchises or licenses; ratifying prior agreements in the nature of franchise or license rights in existence at the time this act takes effect; repealing all laws or parts of laws in conflict herewith, and providing for the effective date of this act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The county commissioners of Monroe county whenever it shall be made to appear to them that the convenience of the public requires the establishment, maintenance and operation within the county of a community antenna system or systems, closed circuit or cable television system or systems, or any other similar communication or distribution systems or services are hereby given the power to grant by resolution a franchise or license to any company, corporation, partnership or individual who shall make application to the county commissioners for such franchise or license and demonstrate to the county commissioners in support of said application that the applicant is financially responsible and presently capable of carrying the purposes of the franchise or license into execution.

Section 2. The county commissioners of Monroe county shall not give or grant any franchise or license as described in section 1 or any renewal thereof for any term exceeding thirty years, or without reserving the right and requiring the grantee of such franchise or license, as a condition precedent of the taking effect of the grant, to give and grant to the county the right at the end of the

term for which any franchise is granted to purchase at fair market value all the property and property rights of any such franchised or licensed operation held and used in connection with the grant of the franchise or license involved wherever such property or property rights are located.

In the event the franchised or licensed business involved is operating or then presently capable of being operated as a going concern at the end of the franchise or license term, the fair market value shall be based upon the value of the said property and property rights considered together as a functioning business entity and not upon the value of each separate item of such property considered without reference to the franchised or licensed business as a functioning business entity.

In determining the fair market value, if the county commissioners and the grantee cannot agree then the county commissioners and the grantee shall each name an appraiser, and the two appraisers so named shall name a third appraiser who shall be a disinterested person. All three appraisers must be persons of high standing and integrity with experience in property evaluation. The three appraisers so named shall after a thorough investigation fix the value of the said property and property rights as a functioning business entity. If after a reasonable period the named appraisers cannot agree as to the value, then they shall be discharged and the county commissioners and the grantee shall name other appraisers in the same manner. This method of naming and discharging appraisers shall continue until agreement as to the value is reached.

Section 3. The county commissioners under the exercise of the power given by this act may grant an exclusive or limited franchise or license, operating in either a portion

or throughout the limits of Monroe county, including municipalities therein. The franchise or license rights contemplated by this act when granted within the purview hereof shall continue in such grantee, or personal representatives, successors or assigns for the full term granted; provided, however, that the county commissioners and the grantee of any such franchise or license shall have the right at any time to make any subsequent agreement, not contrary to this act, respecting the franchise or license that the parties deem mutually advantageous to all concerned affecting the operation of the franchised or licensed system or service, and the franchise or license mutually agreed upon and approved by virtue of any such subsequent agreement may be extended for a full term not to exceed thirty years from the date of such subsequent agreement. Any such subsequent agreement must be voluntarily approved by the county commissioners and by the grantee, and, if so approved, it then must be adopted by resolution of the county commissioners.

Section 4. No municipality in Monroe county shall give or grant any franchise or license for any purpose which is contrary to or in conflict with any franchise or license granted by the county commissioners or contrary to or in conflict with any provision of this act governing the grant of a franchise or license by the county commissioners of Monroe county.

Section 5. The county commissioners shall not give or grant any new or additional franchise or license, or any new or additional franchise or license rights provided for in this act, which shall tend to lessen or impair the quality or the efficiency of operation of a system or service being offered and used by the inhabitants of Monroe county under an existing franchise or license, or which shall have any undue adverse impact upon or which shall seriously interfere with the primary business purposes, operation,

or income of any then existing licensee or franchise holder, or which shall cause an undue adverse impact upon or seriously limit or restrict the normal or natural growth, development and income, or adaptation to changing circumstances with respect to matters within the ambit of the primary business purpose, operation or income of any such existing licensee or franchise holder, or which shall directly impair or depreciate the value of any property or property right owned by any such existing licensee or franchise holder. The term "existing licensee or franchise holder" for the purposes of this act shall include those hereafter granted pursuant to this act, from and after its effective date, as well as any franchise, license or other agreement in the nature thereof existing at the time of the passage of this act and ratified hereunder.

Any resolution or agreement in the nature of a franchise or license in existence at the time this act is passed between the county commissioners of Monroe county and any company, corporation, partnership or individual for the establishment, maintenance and operation of a community antenna system, closed circuit or cable television or any other similar communication or distribution system or service is hereby expressly ratified and confirmed in such company, corporation, partnership or individual.

Section 6. In addition to the power to purchase as provided in section 2 of this act, the county commissioners are hereby granted the power to renew any existing franchise or license or to grant a new franchise or license for the continuation of the system or service then being operated under an expiring franchise or license at the end of the term of the expiring franchise or license involved on such terms as are reasonable and just. In the event the county commissioners determine to renew an existing franchise or license or to grant a new franchise or license for the continuation of the particular system or service the

commissioners shall give the first option to the grantee then holding and operating the desired system or service under the particular franchise or license concerned to renew the existing franchise or license or to accept the new franchise or license to be granted.

Section 7. The county commissioners at a time no earlier than thirty months nor later than twenty-four months prior to the expiration date of any franchise or license given or granted under this act or ratified hereunder shall give to the grantee thereof at the grantee's principal business office written notice of the county commissioners' election either to purchase or to renew the expiring franchise or license or to grant a new franchise or license for the continuation of the system or service under the expiring franchise or license involved. In the event the written notice is not given within the time provided herein, the expiring franchise or license involved automatically will be renewed for an additional period equal to the original franchise period and subject to the same terms contained in the franchise or license involved prior to its original expiration date.

It is provided, however, that the provisions of this section shall not in any way limit or restrict the provisions of section 3 of this act concerning the right or authority of the county commissioners and the grantee of any franchise or license at any time to enter into a subsequent mutual agreement to extend or renew such franchise or license or for any other purpose within the purview of this act.

Section 8. If any section of this act or any sentence, word, phrase or part thereof is for any reason held or declared to be unconstitutional, invalid or void, it is declared to be the specific legislative intent that such unconstitutional, invalid or void portion shall not be construed to affect the remaining provisions of this act and that the act be construed and applied as if the unconstitutional, invalid or void portions had never been enacted.

Section 9. All laws or parts of laws in conflict herewith are hereby repealed.

Section 10. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 25, 1965.

APPENDIX G

CHAPTER 65-1927

SENATE BILL NO. 1294

AN ACT granting to Cable-Vision, Inc., a Florida corporation, the right, privilege, license and franchise, for a period of thirty (30) years for the operation of a cable television system throughout Monroe county, Florida, and all municipalities therein, including the furnishing of direct wire reception of television, radio, music, closed circuit programs, signals, and similar services, together with necessary rights to erect and maintain poles, wires, fixtures, towers, amplifiers, electronic equipment, etc., along the streets, alleys, avenues and highways and other public places throughout the county and all municipalities therein; providing the terms and conditions of such franchise; prescribing charges and service rates; providing for taxes; providing for termination and lease of this franchise and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Whenever used in this act the following terms or words shall have the meaning herein ascribed to them unless the context or the particular provision in which they are used expressly provides to the contrary. The terms grantee or franchise holder shall mean and be used interchangeably with Cable-Vision, Inc., its successors or assigns, as the case may be. County shall mean Monroe county, Florida. County Commissioners shall mean the County Commissioners of Monroe county, Florida.

Section 2. Cable-Vision, Inc., a Florida corporation, its successors or assigns is granted for a period of thirty (30) years and during the period of any renewals and extensions thereof as may hereafter be authorized, the right, privilege, license, and franchise to furnish direct wire reception of television, radio, music, closed circuit programs, signals, and services to the inhabitants of Monroe county, or any person, firm or corporation within said county limits, including the municipalities therein, by: (1) programs and services originating in Monroe county and elsewhere which consist of either live, transcribed, recorded, film and/or other means, (2) programs and services received by wire, microwave, or cable from outside of the county limits of Monroe county, (3) programs and services received by relay, and (4) by the means of the establishment of a master antennae, utilizing a master control unit and amplifier and relaying the signals and services directly to the subscriber, together with the rights to erect and maintain such poles, wires, fixtures, towers, amplifiers, electronic equipment, etc., on, above and below the streets, avenues, highways, roads and other public places within said county and all municipalities therein for the purpose of erecting, constructing, laying, owning, leasing, or otherwise repairing, maintaining and operating such system, all such right and use to be and to continue

on the conditions and terms as herein stated, and providing further that existing or hereafter erected utility poles, underground and other, and facilities may be used with the permission of the owners thereof.

Section 3. The poles and wires described in section 2 of this act shall be placed and maintained so as not to interfere with travel or use of such streets, avenues, alleys, roads, highways and other public places of said county and the municipalities therein, and Cable-Vision, Inc., shall hold the county and the municipalities therein free and harmless from damages arising from any abuse or negligence of Cable-Vision, Inc. The poles and wires shall be placed so as not to interfere with the flow of water in any sewer, drain or gutter or with any gas or water pipe lines, and this grant is made and is to be enjoyed subject to all such reasonable rules, regulations and resolutions of a police nature as said county may authorize or may see proper from time to time to adopt, not destructive of the rights herein granted.

Section 4. The franchise holder, its successors and assigns, shall have the authority, right and privilege to charge for installation and services the following contribution costs and service rates:

INSTALLATION

$150.00 exclusive of all taxes and licenses for contribution for installation in each individual home; provided, however, that the location thereof shall not require labor and/or materials in excess of that provided for in the current rate schedules of the company. If additional labor and/or materials are required, the company may require an additional contribution.

$175.00 exclusive of all taxes and licenses for contribution for installation in each commercial place of busi-

ness or combination business and home; provided, however, that the location thereof shall not require labor and/or materials in excess of that provided for in the current rate schedules of the company. If additional labor and/or materials are required, the company may require an additional contribution.

The franchise holder is hereby authorized to lower or raise the contribution as herein provided but shall not raise them beyond the maximum set forth herein without approval of the board of county commissioners; it being understood, however, that if the location of the installation is beyond one hundred fifty feet from the main distribution system of the company and/or requires labor and/or materials in excess of that provided for in the current rate schedules of the company, the company may raise the installation charges thereof without further approval of the board of county commissioners; exclusive of all taxes and licenses.

The contribution hereinabove provided is for the installation of one outlet only. The franchise holder is hereby authorized to require an additional contribution for the installation of additional outlets, other work, special installations and/or to furnish special programs and services now or hereafter made available when requested by the subscriber.

The franchise holder is hereby authorized to classify the installation cost or fee as a "contribution in aid of construction". The franchise holder is also hereby authorized to designate as a "special installation" any installation requiring labor and/or materials in excess of that provided for in the current rate schedules of the company.

SERVICE RATES

$6.95 per month for individual homes where franchise holder provides one channel and/or service.

$10.00 per month for commercial place of business or combination business and home, where franchise holder provides one channel and/or service.

The franchise holder is hereby authorized, without further authority from or notice to the board of county commissioners, to increase the service rates to provide for additional costs of operation and/or as additional channels, services or facilities are installed, but in no event shall such monthly rates be more that $7.50 per month per channel and/or service for the individual in a home, exclusive of fees, licenses, and costs, now or hereafter applicable, for special programs, closed circuit programs, special services, and music services, and exclusive of all taxes and licenses; and, not to exceed the sum of $10.00 per month per channel and/or service for the individual user and consumer in a commercial place of business or combination business and home, exclusive of fees, licenses, and costs, now or hereafter applicable, for special programs, closed circuit programs, special services, and music services, and exclusive of all taxes and licenses.

The franchise holder is hereby authorized to lower or raise the monthly rates as herein provided, but shall not raise them beyond the maximum set forth herein without approval of the board of county commissioners; it being understood, however, that if the location of the installation is beyond one hundred fifty feet from the main distribution system of the company and/or requires labor and/or materials in excess of that provided for in the current rate schedules of the company, the company may raise the monthly service charges thereof without further approval

of the board of county commissioners; exclusive of all taxes and licenses, special programs, closed circuit programs, special services and music services.

The monthly rates hereinabove provided are for furnishing service to one outlet on the premises of each individual subscriber. The franchise holder is hereby authorized to charge additional monthly service rates for service to additional outlets and special installations. The franchise holder may also make additional charges to those subscribers who desire to receive special programs and services now or hereafter made available.

TAXES

The contributions and monthly service rates hereinabove set forth do not include Federal, State, or County excise taxes, fees and licenses, wire taxes and other taxes and licenses imposed on the subscriber of the company now or in the future.

Section 5. The county commissioners shall have the right to terminate this franchise at the expiration of the term provided herein, or at the expiration of any extensions or renewals subsequently granted, upon purchasing at fair market value all the property and property rights of the grantee held and used in connection with this franchise wherever such property or property rights are located, which property or rights shall include but shall not be limited to all franchises, leases and contracts for service fairly and reasonably made by the grantee in connection with its operation under the franchise granted by this act.

In the event Cable-Vision, Inc., its successors or assigns, is operating or is capable of being operated at the expiration of the term of this franchise as provided herein or as extended or renewed by subsequent grant, and the

county commissioners should elect to purchase as provided herein, the fair market value shall be based upon the value of the said property and property rights considered together as a functioning business entity and not upon the value of each separate item of such property considered without reference to the franchised or licensed business as a functioning business entity.

In determining the fair market value, if the county commissioners and the grantee cannot agree then the county commissioners and the grantee shall each name an appraiser, and the two appraisers so named shall name a third appraiser who shall be a disinterested person. All three appraisers must be persons of high standing and integrity with experience in property evaluation. The three appraisers so named shall after a thorough investigation fix the value of the said property and property rights as a functioning business entity. If after a reasonable period the named appraisers cannot agree as to the value, then they shall be discharged and the county commissioners and the grantee shall name other appraisers in the same manner. This method of naming and discharging appraisers shall continue until agreement as to the value is reached.

Section 6. The operations of Cable-Vision, Inc. in supplying the inhabitants of Monroe county with television, radio, music, closed circuit programs, signals, services and facilities, and in using the streets and public places of said county and the municipalities therein in supplying said television, radio, music, closed circuit programs, signals, services and facilities, shall not be considered as a public utility, and such operations shall be conducted under the franchise hereby granted, and shall be held by the grantee, so long as the grantee complies with all the provisions set forth in this franchise. It is further provided that the county commissioners and the grantee

shall have the right at any time to make any subsequent agreement, not contrary to law, respecting this franchise that is deemed mutually advantageous to all concerned affecting the operation of the franchise, and the franchise mutually agreed upon and approved by virtue of any such subsequent agreement may be extended or renewed for a full term not to exceed thirty years from the date of such subsequent agreement. Any such subsequent agreement must be voluntarily approved by the county commissioners and by the grantee, and, if so approved, it then must be adopted by resolution of the county commissioners.

Section 7. No municipality in Monroe county shall give or grant any franchise or license for any purpose which is contrary to or in conflict with this franchise or contrary to or in conflict with any provision of law governing the grant of a franchise or license by the county commissioners of Monroe county.

Section 8. The county commissioners shall not give or grant any new or additional franchise or license, or any new or additional franchise or license rights which shall tend to lessen or impair the quality or the efficiency of operation of the business being operated by the grantee under this franchise, or which shall have any undue adverse impact upon or which shall seriously interfere with the primary business purposes or operation of this franchise or the income of the franchise holder, or which shall cause an undue adverse impact upon or seriously limit or restrict the normal or natural growth or development or adaptation to changing circumstances with respect to matters within the ambit of the primary business purpose or operation of this franchise, or which shall directly impair or depreciate the value of any property or property rights owned by the franchise holder.

Section 9. In addition to the power to purchase as provided in section 5 of this act, the county commissioners are hereby granted the power to renew this franchise or to grant a new franchise or license for the continuation of the business then being operated under this franchise at the expiration of the term of this franchise on such terms as are reasonable and just. In the event the county commissioners determine to renew this franchise or to grant a new franchise or license for the continuation of the particular business then being operated by the grantee herein the commissioners shall give the first option to the grantee herein to renew this franchise or to accept the new franchise or license to be granted by the commissioners.

Section 10. In the event the county annexes any territory subsequent to this grant or any extension or renewal thereof, any portion of the operation of the franchise holder that may be located within such annexed territory and upon the streets, alleys, and public grounds thereof shall thereafter be subject to all the terms of the grant as though it were an extension made thereunder.

Section 11. The county commissioners at a time no earlier than thirty months nor later than twenty-four months prior to the expiration date of this franchise shall give to the grantee herein at the grantee's principal business office written notice of the county commissioners' election either to purchase or to renew this franchise or of the commissioners' intent to grant a new franchise or license for the continuation of the business being operated under this franchise. In the event the written notice is not given within the time provided herein, the franchise herein granted automatically will be renewed for an additional period equal to the original franchise period

provided herein and subject to the same terms contained in this act.

It is provided, however, that the provisions of this section shall not in any way limit or restrict the provisions of section 5 of this act concerning the right or authority of the county commissioners and the grantee herein to enter into a subsequent mutual agreement to extend or renew this franchise or for any other purpose within the purview of this act.

Section 12. It is declared to be the legislative intent that, if any section, subsection, sentence, clause, or provision of this act is held invalid, the remainder of the act shall not be affected.

Section 13. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section 14. The provisions of this act shall be liberally construed in order to effectively carry out the purposes of this act in the interest of the public.

Section 15. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 25, 1965.

APPENDIX H

AGREEMENT

THIS AGREEMENT, Made and entered into this 9th day of March, A.D. 1965, by and between the COUNTY OF MONROE, STATE OF FLORIDA, a political subdivision of the State of Florida, and CABLE-VISION, INC., a corporation duly organized and existing under the laws of the State of Florida, having its principal place of business in the County of Monroe, State of Florida, WITNESSETH:

WHEREAS, the County of Monroe, State of Florida, owns, has custody of and maintains public roads, highways, streets and bridges in the County of Monroe, State of Florida, and

WHEREAS, the County of Monroe, State of Florida, in order to promote the welfare, morale and convenience of the citizens of Monroe County, Florida, acting by and through its Board of County Commissioners, has heretofore duly authorized the execution of this Agreement, now, therefore,

The County of Monroe, State of Florida, in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration in hand paid to it by Cable-Vision, Inc., does hereby grant to said Cable-Vision, Inc., an exclusive franchise for the operation of a cable television system in Monroe County, Florida, under the following terms and conditions:

Section 1. Effective upon the date of the execution of this Agreement, Cable-Vision, Inc., a Florida Corporation, be, and it is hereby granted for a period of 30 years and any renewals and extensions thereof as authorized by the Laws of the State of Florida, the right, privilege,

license, and/or franchise to furnish direct wire reception of television, radio, music, closed circuit programs, signals, and services to the inhabitants of the County of Monroe, Florida, or any person, firm or corporation within said county limits: (1) programs and services originating in Monroe County and elsewhere which consist of either live, transcribed, recorded, film and/or other means, (2) programs and services received by wire, microwave, or cable from outside of the county limits of the County of Monroe, Florida, (3) programs and services received by relay, and (4) by the means of the establishment of a master antennae, utilizing a master control unit and amplifier and relaying the signals and services directly to the subscriber, together with the rights to erect and maintain such poles, wires, fixtures, towers, amplifiers, electronic equipment, etc., along the streets, avenues, alleys, roads and highways and other public places of the county, as may be necessary and/or convenient for the operation of its business in supplying television, radio, music, closed circuit programs, signals and services to the inhabitants of said county and the public in general, and to use and occupy for its television cables, poles, wires, fixtures, amplifiers, towers, electronic equipment, etc., the streets, alleys, avenues, highways, roads and other public places within said county for the purpose of erecting, constructing, laying, owning, leasing, or otherwise repairing, maintaining and operating such system, all such right and use to be and to continue on the conditions and terms as herein stated, and providing further that existing or hereafter erected utility poles and facilities may be used with the permission of the owners thereof.

Section 2. Said poles and wires shall be placed and maintained so as not to interfere with travel or use of such streets, avenues, alleys, roads, highways and other public places of said county and the said Cable-Vision, Inc. shall

hold said county free and harmless from damages arising from any abuse or negligence of the said Cable-Vision, Inc.; that said poles and wires shall be placed so as not to interfere with the flow of water in any sewer, drain or gutter or with any gas or water pipe lines, and this grant is made and is to be enjoyed subject to all such reasonable regulations and resolutions of a police nature as said county may authorize or may see proper from time to time to adopt, not destructive of the rights herein granted.

Section 3. That the franchise holder, its successors and assigns, shall have the authority, right and privilege to charge for installation and services the following contribution costs and service rates:

INSTALLATION

$150.00 exclusive of all taxes and licenses for contribution for installation in each individual home; provided, however, that the location thereof shall not require labor and/or materials in excess of that provided for in the current rate schedules of the company. If additional labor and/or materials are required, the company may require an additional contribution.

$175.00 exclusive of all taxes and licenses for contribution for installation in each commercial place of business or combination business and home; provided, however, that the location thereof shall not require labor and/or materials in excess of that provided for in the current rate schedules of the company. If additional labor and/or materials are required, the company may require an additional contribution.

The franchise holder is hereby authorized to lower or raise the contribution as herein provided but shall not raise them beyond the maximum set forth herein without further approval of the Board of County Com-

missioners; it being understood, however, that if the location of the installation is beyond 150 feet from the main distribution system of the company and/or requires labor and/or materials in excess of that provided for in the current rate schedules of the company, the company may raise the installation charges thereof without further approval of the Board of County Commissioners; exclusive of all taxes and licenses.

The contribution hereinabove provided is for the installation of one outlet only. The franchise holder is hereby authorized to require an additional contribution for the installation of additional outlets, other work, special installation and/or to furnish special programs and services now or hereafter made available when requested by the subscriber.

The franchise holder is hereby authorized to classify the installation cost or fee as a "contribution in aid of construction". The franchise holder is also hereby authorized to designate as a "special installation" any installation requiring labor and/or materials in excess of that provided for in the current rate schedules of the company.

SERVICE RATES

$6.25 per month for individual homes where franchise holder provides 1 channel and/or service.

$10.00 per month for commercial place of business or combination business and home, where franchise holder provides 1 channel and/or service.

The franchise holder is hereby authorized, without further authority from or notice to the Board of County Commisioners, to increase the service rates to provide for additional costs of operation and/or as additional channels, services or facilities are installed,

but in no event shall such monthly rates be more than $7.50 per month per channel and/or service for the individual in a home, exclusive of fees, licenses, and costs, now or hereafter applicable, for special programs, closed circuit programs, special services, and music services, and exclusive of all taxes and licenses; and, not to exceed the sum of $10.00 per month per channel and/or service for the individual user and consumer in a commercial place of business or combination business and home, exclusive of fees, licenses, and costs, now or hereafter applicable, for special programs, closed circuit programs, special services, and music services, and exclusive of all taxes and licenses.

The franchise holder is hereby authorized to lower or raise the monthly rates as herein provided, but shall not raise them beyond the maximum set forth herein without further approval of the Board of County Commissioners; it being understood, however, that if the location of the installation is beyond 150 feet from the main distribution system of the company and/or requires labor and/or materials in excess of that provided for in the current rate schedules of the company, the company may raise the monthly service charges thereof without further approval of the Board of County Commissioners; exclusive of all taxes and licenses, special programs, closed circuit programs, special services and music services.

The monthly rates hereinabove provided are for furnishing service to one outlet on the premises of each individual subscriber. The franchise holder is hereby authorized to charge additional monthly service rates for service to additional outlets and special installations. The franchise holder may also make additional

charges to those subscribers who desire to receive special programs and services now or hereafter made available.

TAXES

The contributions and monthly service rates hereinabove set forth do not include Federal, State, or County excise taxes, fees and licenses, wire taxes and other taxes and licenses imposed on the subscriber or the company now or in the future.

Section 4. The County of Monroe, Florida, reserves the right to terminate this grant upon purchasing at fair market value all the property and property rights of the said Cable-Vision, Inc. held and used in connection with this grant, as well as extensions thereof within the county, and including all franchises, leases and contracts for service fairly and reasonably made in good faith by the said Cable-Vision, Inc., in connection with this franchise.

Section 5. The operations of Cable-Vision, Inc. in supplying the inhabitants of the County of Monroe, Florida, with television, radio, music, closed circuit programs, signals, services and facilities, and in using the streets and public places of said county in supplying said television, radio, music, closed circuit programs, signals, services and facilities, shall not be considered as a public utility, and such operations shall be conducted under a permissive license, hereby granted, and to be held by the said Cable-Vision, Inc. as long as it complies with all the provisions set forth in this Agreement.

Section 6. This grant or franchise shall not be leased, assigned or otherwise alienated except with the consent of the Board of County Commissioners as expressed by Resolution, but this Commission hereby consents, under

this Agreement, to the assignment of the right, privilege, license, and franchise herein granted to Cable-Vision, Inc. to Key West Television Cable Co.

Section 7. That upon the annexation of any territory to the County, the portion of any such operation of the franchise holder that may be located within such annexed territory and upon the streets, alleys, and public grounds thereof shall thereafter be subject to all the terms of the grant as though it were an extension made thereunder.

Section 8. This Agreement shall go into effect immediately upon its passage and adoption.

IN WITNESS WHEREOF, the County of Monroe, State of Florida, has caused this Agreement to be executed in its behalf by its Chairman and the seal of the County of Monroe, State of Florida, to be hereto affixed and attested by its Clerk, and Cable-Vision, Inc., has caused this Agreement to be executed in its behalf by its President and its corporate seal to be affixed, and attested by its Assistant Secretary, all as of the 9th day of March, A. D. 1965.

County of Monroe,
State of Florida
By /s/ (Illegible)
Chairman of the Board of County Commissioners of Monroe County, Florida

Attest:

/s/ Earl R. Adams

As Clerk of the Circuit Court of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County, and ex officio Clerk of the Board of County Commissioners of Monroe County, Florida

(Seal)

Cable-Vision, Inc.

By /s/ (Illegible)
President

(Seal)

/s/ Constance W. Weatherford
Assistant Secretary

Signed, Sealed and Delivered in the Presence of:

/s/ (Illegible)

/s/ (Illegible)

As to Cable-Vision, Inc.

/s/ (Illegible)

/s/ (Illegible)

As to Monroe County, Florida

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-627

CABLE-VISION, INC., a Florida Corporation, and
TELE-MEDIA COMPANY OF KEY WEST,
Its Successor in Interest,
Appellants,

vs.

WILLIAM A FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

RULE 16 MOTION TO DISMISS AND/OR AFFIRM

PAUL E. SAWYER, ESQ.
County Attorney for Monroe County
P. O. Box 571
Key West, Florida 33040

and

HORTON, PERSE & GINSBERG
410 Concord Building
Miami, Florida 33130
Attorneys for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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WILLIAM A FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

RULE 16 MOTION TO DISMISS AND/OR AFFIRM

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand in this Court, and as follows: appellants, Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, its successor in interest, as "CABLE-VISION;" and appellees, William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William

Carter, as and constituting The Board Of County Commissioners of Monroe County, a political subdivision of the State of Florida, as "COMMISSIONERS." The symbols "A" and "AA" shall stand respectively for the appendices filed by appellants and appellees. Contemporaneously herewith appellees have filed a request to certify additional portions of the record. Conformed copies of these portions of the record are reproduced, infra, as a part of appellees' appendix.

All emphasis appearing in this motion is supplied by counsel unless otherwise noted.

II.

THE MOTION—GROUNDS FOR DISMISSAL AND/OR AFFIRMANCE

The appellees file this their Rule 16 motion to dismiss and/or affirm upon the following separate, distinct and alternative grounds:

1. The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

2. The appeal does not present a substantial federal question.

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

5. The judgment appealed rests on an adequate non-federal basis.

III.

OPINIONS BELOW

The following pertinent orders, decisions and opinions have been rendered in the premises by the Florida courts:

1. On March 12, 1974, the Circuit Court for Monroe County, Florida, entered a final declaratory judgment holding that COMMISSIONERS' authorization of a television translator system was not an unconstitutional legislative impairment of obligations of the existing exclusive franchise for cable television granted CABLE-VISION. (A 1-4) CABLE-VISION bypassed the District Court of Appeal, Third District, of Florida, and took a direct appeal to the Supreme Court of Florida.

2. On October 2, 1974, the Supreme Court of Florida—on motion of COMMISSIONERS—entered its order transferring CABLE-VISION'S appeal to the District Court of Appeal, Third District, holding that said court, and not the Supreme Court, had appellate jurisdiction over the matter. (AA 1)

3. On December 9, 1975, the District Court of Appeal entered a decision and opinion affirming the declaratory judgment in part and reversing in part. This decision is reported at 324 So. 2d 149. (A 5-17) CABLE-VISION *appealed* said decision to the Supreme Court of Florida. CABLE-VISION *did not* file a timely petition for writ of certiorari.

4. On May 27, 1976, the Supreme Court entered an order granting COMMISSIONERS' motion to dismiss the appeal. (A 18)

5. On July 8, 1976, the Supreme Court of Florida entered an order denying CABLE-VISION'S motion to treat its previously filed notice of appeal as a petition for writ of certiorari. (A 19)

IV.

NO JURISDICTIONAL GROUNDS

COMMISSIONERS reject the statement of jurisdictional grounds contained in CABLE-VISION'S jurisdictional statement as improper and incorrect. The reasons why this Court is without jurisdiction and/or should refrain from exercising jurisdiction over this matter are detailed below.

V.

STATUTES AND ORDINANCE INVOLVED

The statutes and ordinance involved here are: Chapter 65-1916, Laws of Florida (A 29-35); Chapter 65-1927, Laws of Florida (A 35-44); and Ordinance 5-1973 of Monroe County, Florida. (A 25-29)

VI.

QUESTION PRESENTED

The question presented by CABLE-VISION'S jurisdictional statement and COMMISSIONERS' motion to dismiss and/or affirm is whether or not this Court is without jurisdiction and/or should refrain from exercising jurisdiction over the subject appeal on one or more of the following grounds:

1. The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

2. The appeal does not present a substantial federal question.

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

5. The judgment appealed rests on an adequate nonfederal basis.

VII.

STATEMENT OF CASE

Sans the editorialized and merits argumentative, COMMISSIONERS accept the statement of case contained at pages 4-7 of CABLE-VISION'S jurisdictional statement as basically correct insofar as it goes. For the sake of completeness, however, COMMISSIONERS are constrained to include herein the following chronology of legal events:

1. *March 12, 1974*—the trial court entered final declaratory judgment in the within cause which, in pertinent part, provides:

* * *

> "4. That the plaintiff notwithstanding the existence of a valid franchise may itself engage in the business of furnishing television to its citizens by means of television broadcast translator stations. It should be noted that in 1972 the Home Rule Amendment to the State Constitution granted broad powers to counties, including Monroe, to enact ordinances similar to Ordinance 5-1973 relating to the establishment of translator stations and that such Ordinance is within the ambit of the Home Rule Amendment.

"This Court does not construe the franchise agreement to prohibit the plaintiff from furnishing to the citizens of Monroe County television broadcast translator station services. *This is based upon the principle that exclusive franchises from a governmental body to a private corporation must be strictly construed. The franchise here provides for 'direct wire reception of television' and is silent as to the possible use of translator stations.*

"The actions of the plaintiff in authorizing a translator system *was not* a legislative impairment of an existing contract between the defendant and the plaintiff so as to render the authorizing ordinance relating to translator stations unconstitutional. Neither Chapter 65-1916 nor Chapter 65-1927 prohibit the plaintiff from engaging in activities which might impair the quality of or the value of the defendant's franchise *but only prohibit the plaintiff from granting new or additional franchises to others.* Although there may be the suggestion that implicit in the two chapters is a provision that the plaintiff will not compete, nevertheless such suggestion ignores the well-established principle that public grants are strictly construed and that nothing should pass to the grantee of such a franchise by implication. The reason behind this rule of construction is that the object and end of all government is to promote the common interests of the people, their recreation, welfare and prosperity and it is never assumed that the governmental authority intended to diminish this power. Governments should never be presumed to surrender this power because the entire community has an interest in preserving it undiminished. The Statutes (Chapter 65-1916 and Chapter 65-1927), the existing ordinance 5-1973 and the franchise agreement disclose that what was given to the defendant was not an exclusive franchise to furnish all forms of television reception but rather it was an exclusive right to furnish cable television services only." (A 3-4)

* * *

2. *April 8, 1974*—CABLE-VISION bypassed the District Court of Appeal, Third District of Florida, and took a direct appeal from the Circuit Court's final declaratory judgment to the Supreme Court of Florida. (AA 3-4)

3. *June 20, 1974*—COMMISSIONERS filed a motion with the Supreme Court of Florida to dismiss or transfer the appeal taken by COMMISSIONERS on grounds that—pursuant to the provisions of the Florida Constitution and appellate rules—the Florida Supreme Court did not have jurisdiction over an appeal merely passing on the validity of a county ordinance, such jurisdiction being vested in the appropriate District Court of Appeal. (AA 5-6)

4. *October 2, 1974*—the Supreme Court of Florida entered an order granting COMMISSIONERS' motion to transfer, and transferring the subject appeal to the District Court of Appeal, Third District. (AA 1)

5. *December 9, 1975*—the District Court of Appeal, Third District, entered a decision affirming in part and reversing in part and specifically holding that the CABLE-VISION franchise was not exclusive, and that the subject county ordinance was proper on grounds similar to those relied upon by the Circuit Court. (A 5-17) Pursuant to the provisions of the Florida Appellate Rules, the District Court's decision was rendered on January 22, 1976, upon denial of CABLE-VISION'S timely filed petition for rehearing, and CABLE-VISION had until thirty (30) days thereafter, February 21, 1976, in which to commence *ap-*

propriate further proceedings in the Supreme Court of Florida, to wit: to commence an appeal or file a petition for writ of certiorari with the Supreme Court of Florida.

6. *February 20, 1976*—CABLE-VISION filed a notice of appeal seeking review of the decision rendered by the District Court of Appeal. (AA 7-8)

7. *April 14, 1976*—COMMISSIONERS filed with the Supreme Court of Florida a motion to dismiss CABLE-VISION'S appeal from the District Court decision on grounds that the Supreme Court was without jurisdiction over the matter since the District Court decision passed on the validity of a county ordinance and not on the validity of a State Statute or Federal Statute or Treaty. (AA 9-10)

8. *May 27, 1976*—the Supreme Court of Florida entered its order granting COMMISSIONERS' motion and dismissing CABLE-VISION'S appeal to the Supreme Court from the decision rendered by the District Court on jurisdictional grounds. (AA 11)

9. *June 1, 1976*—CABLE-VISION filed with the Supreme Court of Florida a petition—under the aegis of Section 59.45, Florida Statutes—asking that Court to treat its erroneously filed notice of appeal as a petition for writ of certiorari. (AA 12-14)

10. *July 8, 1976*—the Supreme Court of Florida entered its order denying CABLE-VISION'S motion to treat the erroneously filed notice of appeal as a petition for writ of certiorari.

Ultimately, CABLE-VISION commenced the within proceedings in this Court.

VIII.

ARGUMENT—MOTION TO DISMISS OR AFFIRM SHOULD BE GRANTED

Article V, Section 3(b), Florida Constitution, relating to Supreme Court jurisdiction provides:

* * *

"(b) Jurisdiction. The supreme court:

"(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

"(2) When provided by general law, shall hear appeals from final judgments and orders of trial courts imposing life imprisonment or final judgments entered in proceedings for the validation of bonds or certificates of indebtedness.

"(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

"(4) May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the

supreme court to review, and all writs necessary to the complete exercise of its jurisdiction.

"(5) May issue writs of mandamus and quo warranto to state officers and state agencies.

"(6) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

"(7) Shall have the power of direct review of administrative action prescribed by general law."

* * *

Article V, Section 4(b), Florida Constitution, relating to District Court of Appeal jurisdiction, provides:

* * *

"(b) Jurisdiction.

"(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

"(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

"(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of

mandamus, certiorari prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts."

* * *

Manifestly, Florida has a two-tier appellate court system. The Florida District Courts of Appeal were not established as intermediate courts or more way stations to the Supreme Court, but as courts of final appellate jurisdiction. When the people of Florida adopted the amendment to Article V of the Florida Constitution, establishing the District Courts of Appeal, they were assured that most litigation in the state would not go beyond those courts. A narrow scope of jurisdiction of the Supreme Court was specified in Article V of the Constitution, and the Article has been so applied and construed by that Court. See *Short* v. *Grossman*, Fla. 1971, 245 So. 2d 217. As recently stated by Justice England in his concurring opinion in *Golden Loaf Bakery, Inc.* v. *Charles W. Rex Construction Co.*, Fla. 1976, 334 So. 2d 585:

* * *

"This court's conflict jurisdiction was created in 1957, at the same time the legislature established the District Courts of Appeal. The obvious and limited purpose of that form of appellate review was to allow us to clarify the law when it becomes necessary under the new court structure created by the Constitution. Where our views on a matter of law are not absolutely necessary, we should not express them. Moreover, the constitutional rule of our District Courts as courts of last resort is unnecessarily diminished to the extent we use this discretionary jurisdictional tool to express our-

selves in situations which do not require our clarification."

* * *

In sum, the Florida Supreme Court for the most part exercises discretionary direct conflict jurisdiction, and will only—indeed, may constitutionally only—take jurisdiction of a direct appeal under very limited circumstances. It does have jurisdiction of a District Court decision "initially and directly passing on the validity of a state statute or a federal statute or treaty." It does not have jurisdiction of a District Court decision which merely passes on the validity of a county ordinance.

Reverting to the case at Bar, for the reasons which follow, this Court should grant the subject motion for dismissal and/or affirmance:

1. The declaratory judgment appealed passed only on the validity of a county ordinance. Thus, the Supreme Court of Florida did not have jurisdiction over the initial direct appeal filed by CABLE-VISION, and properly transferred the initial appeal to the District Court of Appeal, Third District.

2. The decision rendered by the District Court of Appeal, Third District, passed only upon the validity of a county ordinance. The District Court—constitutionally—was thus, in the absence of a showing of the existence of Florida Supreme Court direct conflict jurisdiction, the state court of final appellate jurisdiction which disposed of this matter. If CABLE-VISION desired to appeal to this Court from the District Court of Appeal decision, it should have done so immediately and timely. CABLE-VISION did not immediately and timely file such an appeal.

3. Instead, CABLE-VISION commenced an obviously improper direct appeal to the Supreme Court of Florida.

The Supreme Court obviously had no jurisdiction because the decision sought to be reviewed merely passed upon the validity of a county ordinance. The Supreme Court of Florida, therefore, properly granted COMMISSIONERS' motion to dismiss the improper appeal. The Supreme Court of Florida's order of dismissal was no more and no less than a technically proper dismissal of an appeal improvidently taken. That order in no sense constitutes the type of opinion, decision or judgment which may be appealed to this Court since it did not pass on any legal question save the jurisdictional question.

4. Subsequent to the entry of the order of dismissal by the Supreme Court of Florida, CABLE-VISION filed a petition to consider the notice of appeal as a petition for writ of certiorari. This without any showing of the existence of direct conflict, or even the attempt to make such a showing. In the abstract, there was no direct conflict. The Supreme Court of Florida properly on jurisdictional grounds denied CABLE-VISION'S petition. The order of denial in no sense constituted the type of opinion, decision or judgment which can be appealed to this Court.

5. Entirely aside and apart from the foregoing, it is manifest that the subject appeal does not present a substantial federal question, and/or the purported federal question raised was not expressly decided by the Supreme Court of Florida, and/or the Supreme Court order appealed rests on adequate non-federal bases. Indeed, this record reflects that the same is true of the District Court of Appeal decision which should have been appealed to this Court in the first instance.

The following decisions of this Court mandate dismissal and/or affirmance on a record such as this: *Randall* v. *Board of Commissioners of Tippecanoe County, Indiana*, 261 U.S. 252, 67 L. Ed. 637, 1923; *Williams* v. *State of Florida*,

399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446, 1970; and *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583, 1953.

IX.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the subject motion to dismiss and/or affirm must be granted.

Respectfully submitted,

PAUL E. SAWYER, ESQ.
County Attorney for Monroe County
P. O. Box 571
Key West, Florida 33040

and

HORTON, PERSE & GINSBERG
410 Concord Building
Miami, Florida 33130
Attorneys for Appellees

By: EDWARD A. PERSE

CERTIFICATE OF COUNSEL

I, EDWARD A. PERSE, one of the attorneys for THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, et al., appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of November, 1976, I served copies of the foregoing Rule 16 Motion to Dismiss and/or Affirm on the several parties thereto as follows:

1. On Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, its successor in interest, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorneys of record as follows:

Julius F. Parker, Jr., Esq.
Madigan, Parker, Gatlin, Truett
& Swedmark
P. O. Box 669
318 North Monroe Street
Tallahassee, Florida 32302

Michael G. Kushnick, Esq.
Rose and Kushnick
919 Eighteenth Street, N. W.
Washington, D. C. 20006

EDWARD A. PERSE
HORTON, PERSE & GINSBERG
410 Concord Building
Miami, Florida 33130
Attorneys for Appellees

APPENDIX

IN THE SUPREME COURT OF FLORIDA

Case No. 45,402

July Term, A. D. 1974

Wednesday, October 2, 1974

CABLE-VISION, INC., a
Florida corporation,
Appellant,

vs.

WILLIAM A. FREEDMAN, JR.,
ET AL.,
Appellees.

Upon consideration of appellees' Motion to Dismiss or Transfer and Response thereto:

It appearing to the Court that the issues involved in the appeal in the above cause are matters within the jurisdiction of the District Court of Appeal, Third District of Florida, therefore, pursuant to the provisions of Florida Appellate Rules, it is ordered that said cause be transferred to said District Court for consideration and determination after five (5) days from this date unless, in the meantime, attorneys of record for the parties, or any of them shall bring to the attention of the Court that the cause is one which should be heard and determined by this Court. Unless such cause is shown by writing filed in this Court within the time stated, the Clerk shall complete the transfer in accord with the above directive without further order.

ADKINS, C. J., ROBERTS, ERVIN, BOYD and McCAIN, JJ., concur

Y

CC: Hon. W. P. Carter, Clerk
Hon. Ralph W. White, Clerk
Hon. James W. Kehoe, Judge
Horton & Perse
(Hon. Mallory H. Horton)
Hon. Paul E. Sawyer
Hon. Julius F. Parker, Jr.
Hon. Tom Harris

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA.

Case No. 73-786-CA-17

WILLIAM A. FREEMAN, JR., BARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,

Plaintiffs,

vs.

CABLE-VISION, INC., a Florida corporation, and THE STATE OF FLORIDA,

Defendants.

NOTICE OF APPEAL

The Defendant, Cable-Vision, Inc., a Florida corporation, takes and enters its appeal to the Supreme Court of Florida to review the order, judgment or decree of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, bearing date the 12th day of March, 1974, and rendered and recorded in O. R. Book 572, Pages 528-531, on March 25, 1974, in the Public Records of Monroe County, Florida. The nature of the Order appealed from is a Final Declaratory Judgment passing directly on the constitutionality of a state statute in the form of a County Ordinance of Monroe County, No. 5-1973. The Ordinance was attacked as an unconstitutional impairment of existing contractual rights and obligations and the Court held:

> "The actions of the Plaintiff in authorizing a translator system was not a legislative impairment of an existing

contract between the defendant and the plaintiff so as to render the authorizing ordinance relating to translator stations unconstitutional."

Appeal is taken directly to the Supreme Court of Florida under the provisions of Rule 2.1 a (5) (a) of the Florida Appellate Rules.

All parties to said cause are called upon to take notice of the entry of this appeal.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Truett & Swedmark
P. O. Box 669—318 N Monroe Street
Tallahassee, Florida 32302
Attorneys for Defendant, Cable-Vision, Inc., a Florida corporation.

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished to Mallory Horton, Esquire, of Horton and Perse, 410 Concord Building, Miami, Florida 33130, and Paul E. Sawyer, Esquire, County Attorney for Monroe County, P. O. Box 571, Key West, Florida 33040, Attorneys for Plaintiffs, and to Tom Harris, Esquire, Assistant Attorney General, Capitol Building, Tallahassee, Florida, 32304, by mail, this 8th day of April, 1974.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

Case No. 45,402

CABLE-VISION, INC., a Florida corporation,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,
Appellees.

MOTION TO DISMISS OR TRANSFER

COME NOW the Appellees, by their attorneys, and move the Court to dismiss this appeal and/or to transfer the same to the District Court of Appeal, Third District of Florida. As grounds for this motion these Appellees would show that the Appellant in its brief, page 4, states as follows:

"Because of this direct ruling on the constitutionality of Ordinance No. 5-1973, this appeal was taken directly to the Supreme Court of Florida under the provisions of Rule 2.1 a (5) (a) of the Florida Appellate Rules."

Article V, Section 3 of the Florida Constitution, 1968 Revision, Subsection (b) (1) provides as follows:

"(b) Jurisdiction. The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal initially and *directly passing on the validity of a state statute* or a federal statute or treaty, or construing a provision of the state or federal constitution." (Emphasis supplied)

Rule 2.1 a (5) (a) of the Florida Appellate Rules is simply a restatement of the constitutional provisions cited above.

By the Appellant's own admission only an ordinance of Monroe County has been passed upon by the Circuit Court. County ordinances are no different than municipal ordinances and this Court is DRESNER v. CITY OF TALLAHASSEE, Fla. 1961, 134 So.2d 228, held that a direct appeal would not lie from a decision passing on the validity of a municipal ordinance. In effect, holding that a municipal ordinance could not be classified as a "state statute" to the same effect is ARMSTRONG, et al v. CITY OF TAMPA, Fla. 1958, 106 So.2d 407.

WHEREFORE, these Appellees respectfully pray that this Court will dismiss this appeal or in the alternative transfer this appeal to the appropriate court, to-wit: the District Court of Appeal, Third District of Florida.

Horton & Perse
410 Concord Building
Miami, FL 33130
and
Paul E. Sawyer, Esquire
Post Office Box 571
Key West, FL 33040
Attorneys for Appellees
By: Mallory H. Horton
Mallory H. Horton

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss or Transfer has been furnished by mail to Julius F. Parker, Jr., Esquire, Post Office Box 669, Tallahassee, FL 32302, Attorney for Appellant, and to Tom Harris, Esquire, Assistant Attorney General, Department of Legal Affairs, Civil Division, 222 West Pensacola Street, Tallahassee, FL 32304, this 20th day of June, 1974.

By: Mallory H. Horton
Mallory H. Horton

IN THE
DISTRICT COURT OF APPEAL FOR THE
THIRD DISTRICT OF FLORIDA

Case No. 74-1408

CABLE-VISION, INC., a Florida corporation,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,
Appellees.

NOTICE OF APPEAL

Cable-Vision, Inc., Defendant-Appellant, takes and enters its appeal to the Supreme Court of Florida to review the opinion of the District Court of Appeal of Florida, Third District, dated December 9, 1975, and revised upon rehearing and dated January 22, 1976. The nature of the Order appealed from is an Opinion affirming in part and reversing in part a final judgment of the Circuit Court for Monroe County, Florida. All parties to said cause are called upon to take notice of the entry of this appeal.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

/s/ Jack M. Skelding, Jr.
Jack M. Skelding, Jr.
Madigan, Parker, Gatlin, Truett
& Swedmark
P. O. Box 669-318 N. Monroe St.
Tallahassee, FL 32302
Attorneys for Cable-Vision, Inc.

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished by United States Mail to Mr. Mallory H. Horton, Horton, Perse & Ginsberg, 410 Concord Bldg., Miami, FL 33130; Mr. Paul E. Sawyer, County Attorney for Monroe County, P. O. Box 571, Key West, FL 33040 and Mr. Tom Harris, Assistant Attorney General, Department of Legal Affairs, Civil Division, 222 West Pensacola Street, Tallahassee, FL 32304, this 20th day of February, 1976.

/s/ Jack M. Skelding, Jr.

IN THE SUPREME COURT OF FLORIDA

Case No. 48,962

CABLE-VISION, INC., a Florida corporation,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS, and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,
Appellees.

MOTION TO DISMISS

COME NOW the appellees by their attorneys and show to the Court that the appellant has taken a full or plenary appeal to this Court from the opinion and decision of the District Court of Appeal filed December 9, 1975 and has asserted certain Assignments of Error directed to said opinion.

The appellees move the Court to dismiss the appeal on the grounds that the Court's jurisdiction is improperly invoked. The District Court in its opinion and decision filed December 9, 1975, a copy of which is attached hereto as modified by its Order of January 22, 1976 a copy of which latter Order is also attached as an exhibit to this motion, clearly demonstrates that the District Court of Appeal did not initially and directly pass on the validity of a State's Statute or a Federal Statute or treaty or construe a provision of the State or Federal Constitution. Appellant's Assignment of Error Number 9 erroneously concludes that the District Court of Appeal held invalid Chapter 65-1916 Laws of Florida but appellees respectfully suggest that a fair reading of the District Court of Appeal's opinion of

December 9, 1975 will adequatley demonstrate that Court did not initially pass on the validity of Chapter 65-1916 Laws of Florida, nor did it hold said law invalid. As a matter of fact the District Court of Appeal did not pass upon the validity of that Statute but simply held that since Chapter 65-1916 and 65-1927 were passed at the same session of the Legislature the last enactment was controlling and therefore the Legislature had not granted to CABLE-VISION an exclusive franchise.

WHEREFORE, the appellees respectfully pray that this Court will, upon consideration of the opinion and decision of the District Court of Appeal of December 9, 1975 dismiss this appeal.

Respectfully submitted,

Paul E. Sawyer

and

Horton, Perse & Ginsberg

410 Concord Building
Miami, Florida 33130
Attorneys for Appellees

By /s/ Mallory H. Horton
Mallory H. Horton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Madigan, Parker, Gatlin, Truett & Swedmark, P. O. Box 669, 318 N. Monroe Street, Tallahassee, Florida 32302 and to Tom Harris, Assistant Attorney General, Capitol Building, Tallahassee, Florida 32304 this 14 day of April, 1976.

/s/ Mallory H. Horton
Mallory H. Horton

IN THE SUPREME COURT OF FLORIDA
District Court of Appeal, Third District 74-1408

Case No. 48,962

January Term, 1976

Thursday, May 27, 1976

CABLE-VISION, INC., ETC.,
Appellant,

vs.

WILLIAM A. FREEMAN, JR., ET AL., as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, ETC.,
Appellees.

Upon consideration of the Motion to Dismiss filed by attorneys for appellees and Response thereto, it is ordered that said motion is granted and this appeal be and is hereby dismissed.

OVERTON, C.J., ROBERTS, ADKINS, SUNDBERG AND HATCHETT, JJ., CONCUR

Y

CC: Hon. W. P. Carter, Clerk
Hon. Ralph W. White, Clerk
Hon. James Kehoe, Judge
Hon. Julius F. Parker, Jr.
Hon. Jack M. Skelding, Jr.
Hon. Paul E. Sawyer, Hon.
Mallory H. Horton
Hon. Paul Sawyer
Hon. Tom Harris

IN THE SUPREME COURT OF FLORIDA

Case No. 48,962

CABLE-VISION, INC., a Florida corporation,
Appellant,

vs.

WILLIAM A. FREEMAN, JR.; HARRY S. PRITCHARD; JOHN W. PARKER; HARRY HARRIS, and WILLIAM CARTER, as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a political subdivision of the State of Florida,
Appellees.

PETITION UNDER FLORIDA STATUTES, SECTION 59.45

The Appellant, Cable-Vision, Inc., by its undersigned counsel, respectfully petitions the Court, pursuant to the provisions of Florida Statutes, Section 59.45, to treat the appeal filed herein as a Petition for Certiorari, to allow Cable-Vision, Inc. thirty days within which to file a formal Petition for Certiorari with supporting jurisdictional brief, and in support thereof would show the Court:

1. The Notice of Appeal was filed herein by Cable-Vision, Inc. on February 20, 1976. Cable-Vision's brief would, therefore, have been due in the Supreme Court of Florida on April 30, 1976. The Appellee's Motion to Dismiss the appeal was filed on April 14, 1976, and Cable-Vision's response to the Motion to Dismiss on April 21, 1976. The Court's Order of Dismissal is dated May 27, 1976, and does not make any reference whatsoever to Cable-Vision, Inc.'s request in its response to the Motion to Dismiss that the appeal be treated as Certiorari, pursuant to Section 59.45, Florida Statutes.

2. Cable-Vision, Inc. represents to the Court that it believes that there are at least ten decisions of the Supreme Court of Florida with which the decision of the District Court of Appeal for the Third District herein is in direct conflict so that this Court should review this case by certiorari. Since Cable-Vision, Inc. believed that it had the right to appeal to this Court, it has not had the opportunity to present what it believes to be direct conflicts, nor has this Court has the opportunity to consider whether it does in fact have jurisdiction under conflict certiorari.

3. Cable-Vision, Inc. is prepared to file with this Court within thirty days from its decision herein, a formal Petition for Certiorari with supporting jurisdictional brief.

4. The provisions of Section 59.45, Florida Statutes, clearly set forth the policy that the right to appellate review should not be denied merely because a litigant mistakenly styles its application to an appellate court as an appeal rather than a Petition for Certiorari, and this Court should not deny to Cable-Vision, Inc. its right at least to seek conflict certiorari in the Supreme Court.

WHEREFORE, Petitioner, Cable-Vision, Inc., respectfully petitions the Court to treat the appeal herein as a Petition for Certiorari, to allow thirty days within which for Cable-Vision to file a Petition for Certiorari and supporting jurisdictional brief.

Respectfully submitted,

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.
Madigan, Parker, Gatlin, Truett & Swedmark
P. O. Box 669—318 N. Monroe Street
Tallahassee, Florida 32302
Attorneys for Appellant

I HEREBY CERTIFY that a copy hereof has been furnished to Mr. Mallory H. Horton, Morton, Perse and Ginsberg, 410 Concord Building, Miami, Florida 33130; Mr. Paul Sawyer, County Attorney for Monroe County, P. O. Box 571, Key West, Florida 33040; and to Mr. Tom Harris, Assistant Attorney General, Department of Legal Affairs, Civil Division, 222 W. Pensacola St., Tallahassee, Florida 32304; by mail, this 1st day of June, A. D. 1976.

/s/ Julius F. Parker, Jr.
Julius F. Parker, Jr.

IN THE SUPREME COURT OF FLORIDA

Case No. 48,962

July Term, 1976

Thursday, July 8, 1976

CABLE-VISION, INC., ETC.,
Appellant,
vs.
WILLIAM A. FREEMAN, JR., ET AL., as and constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, ETC.,
Appellees.

On consideration of the Petition Under Florida Statutes, Section 59.45 filed by attorneys for appellant and Response thereto,

IT IS ORDERED that said petition is denied.

Y

CC: Hon. W. P. Carter, Clerk
Hon. Ralph W. White, Clerk
Hon. James Kehoe, Judge
Hon. Julius F. Parker, Jr.,
Hon. Jack M. Skelding, Jr.
Hon. Mallory H. Horton,
Hon. Paul E. Sawyer
Hon. Paul E. Sawyer
Hon. Tom Harris

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-627

CABLE-VISION, INC., a Florida Corporation, and TELE-MEDIA COMPANY OF KEY WEST, Its Successor in Interest,

Appellants,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

APPELLANTS' RESPONSE TO RULE 16 MOTION TO DISMISS AND/OR AFFIRM

JULIUS F. PARKER, JR.
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CABLE-VISION, INC., a Florida Corporation, and
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Appellants,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

APPELLANTS' RESPONSE TO RULE 16 MOTION TO DISMISS AND/OR AFFIRM

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand in this Court, and as follows: Appellants, Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, its successor in interest, as "CABLE-

VISION"; and Appellees, William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, as and constituting The Board of County Commissioners of Monroe County, a political subdivision of the State of Florida, as "COMMISSIONERS". The symbols "A" and "AA" shall stand respectively for the appendices filed by appellants and appellees.

II.

APPELLEES' GROUNDS FOR DISMISSAL AND/OR AFFIRMANCE

Appellees based their Rule 16 Motion to Dismiss and/or Affirmance on the following reasons and grounds:

1. The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

2. The appeal does not present a substantial federal question.

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

5. The judgment appealed rests on an adequate non-federal basis.

III.

ARGUMENT

APPELLEES' POINT 1

The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

Commissioners' apparent contention is that Cable-Vision should have perfected its appeal to the Supreme Court of the United States within ninety days from final disposition of this action by the District Court of Appeal for the Third District of Florida, on the basis that the decision of the District Court of Appeal was the decision of a Court of final appellate jurisdiction. Commissioners are mistaken in that contention. Quite to the contrary, if Cable-Vision had not sought appellate review in the Florida Supreme Court, the Motion to Dismiss or Affirm would be well taken. Cable-Vision sought direct appellate jurisdiction of the Florida Supreme Court and when that Court granted Commissioners' Motion to Dismiss, Cable-Vision filed a Petition under Florida Statutes, Section 59.45, requesting the Supreme Court of Florida to consider the appeal as a Petition for Certiorari. Both of those actions in the Florida Supreme Court were jurisdictional prerequisites to the filing of appeal in this Court. In the case of *Matthews* v. *Huwe*, 269 U.S. 262, this Court passed directly on that question in granting a motion to dismiss an appeal for failure to exhaust all state remedies. As this Court stated:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the supreme court of

the state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the supreme court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made." 269 U.S. at 265.

Whether the Supreme Court of Florida had direct appellate jurisdiction of this case or the right of discretionary review under certiorari, Cable-Vision was required to attempt review in the Supreme Court of Florida as a jurisdictional prerequisite to the filing of this appeal.

As to the Court to which the appeal is directed, the Notice of Appeal is filed correctly in the Court having possession of the record, to-wit: the Circuit Court in and for Monroe County, Florida. Although the notice of appeal refers to appeal from the Supreme Court of the State of Florida, certainly no prejudice can result to any party to this appeal if that designation should turn out to be an error. Appellant Cable-Vision was and is in doubt as to whether this appeal is actually directed to the Supreme Court of the State of Florida or the District Court of Appeal for the Third District. Dismissal of this appeal on such a technical ground would be a basic denial of justice and not in conformance with previous decisions or practice of the Supreme Court of the United States.

APPELLEES' POINT 2

The appeal does not present a substantial federal question.

Prior to the instant litigation, Cable-Vision was the holder of a thirty year exclusive franchise for television services throughout Monroe County, Florida. As a result of the Florida Court decisions herein, Cable-Vision now

faces direct competition from the Grantor of its original franchise, the Commissioners, and in addition, now holds a non-exclusive franchise, so that the Commissioners, if they should choose, could grant additional non-exclusive franchises for cable television services throughout Monroe County. What was before this litigation a very valuable exclusive franchise is now a non-exclusive franchise of much less value—perhaps even worthless.

It is hard to imagine a more substantial federal question than the impairment by state action of previously existing contractual rights. The United States Court of Appeals for the Sixth Circuit stated it well in the case of *Ohio State Life Insurance Company* v. *Clark*, 274 F.2d 771, cert. denied 363 U.S. 828 (1960), when the Court stated:

> "The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; *under the Constitution it is not to be impaired at all.*" 274 F.2d at 778-779. [Emphasis supplied]

APPELLEES' POINTS 3 AND 4

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

Appellees' Points 3 and 4 will be argued together since they are so closely interrelated. Appellees take the position that the purported federal question raised was not timely or properly raised in the state court of final appel-

late jurisdiction, nor expressly decided by the state appellate court of final appellate jurisdiction. The fallacy of that argument is evident by a reading of the complaint filed by Commissioners and especially Paragraphs 7 and 8 thereof which read as follows:

> "7. That the obtaining of a license and the erection and operation of a broadcasting service to the citizens and residents of Monroe County for the purpose of transmitting the signals of a television broadcast station or another translator station, would not in the judgment or opinion of the plaintiff tend to lessen or impair the quality or the efficiency of the operation of the business being operated by the defendant, CABLE-VISION, INC., under its franchise nor would it have any undue adverse impact upon or seriously interfere with the primary business purposes or operations of said franchise service by the defendant CABLE-VISION, INC.
>
> The obtaining of a license for a translator station or stations and the erection and operation of such station or stations by the plaintiff would be a public purpose and for public good and not otherwise prohibited by law.
>
> "8. The plaintiffs are in doubt as to whether or not the acts of the legislature, to wit: Chapters 65-1916 and 65-1927 Laws of Florida, 1965, are constitutional although the plaintiffs believe and so believing allege that said acts are unconstitutional in that they seek to confer upon the defendant, CABLE-VISION, INC. a license or franchise to operate a television service which service is regulated solely and exclusively by the Federal Communications Commission, an agency of the United States Government.

> Alternatively, the plaintiffs allege that the obtaining of a license by the plaintiff to operate a translator broadcasting service to the citizens and residents of Monroe County would not result in an impairment of the franchise of the defendant, CABLE-VISION, INC. or of any of the services which it may supply although large numbers of persons, citizens and residents of Monroe County are not being served by the defendant, CABLE-VISION, INC. under its franchise."

In Cable-Vision's Answer, it responded to those allegations of Paragraphs 7 and 8 of the Complaint as follows:

> "7. Defendant denies the allegations of Paragraph 7 of the Complaint.
>
> "8. Defendant denies the allegations of Paragraph 8 of the Complaint."

Appellee's Point 4 is conclusively rebutted by the following direct quote from the Opinion of the District Court of Appeal for the Third District as it appears on page 13 of the Appendix to the Jurisdictional Statement:

> "Cable-Vision contends that County Ordinance 5-1973, authorizing translator stations is a constitutional impairment of contract. This is not so because the trial court found, after taking testimony, which was uncontroverted, that there was a distinct difference between a cablevision system and the operation of a television broadcast translator system."

APPELLEES' POINT 5

The judgment appealed rests on an adequate non-federal basis.

Cable-Vision contends that there is no non-federal basis on which to sustain the opinion of the District Court

of Appeal for the Third District of Florida. That Court held, again from page 13 of the Appendix to the Jurisdictional Statement, as follows:

> "In view of the fact that Chapter 65-1916 provides for an exclusive franchise and Chapter 65-1927, which came after it, provides for a non-exclusive franchise, the Court, under the statutory construction applicable, properly concluded that the franchise itself was not exclusive as to all forms of television reception."

In other words, the Florida Legislature created an exclusive franchise and then by later statute reduced it to a non-exclusive franchise. It is difficult to imagine a more obvious and blatant case of state action impairing the obligation of a previously existing contractual right.

CONCLUSION

For the foregoing reasons, Cable-Vision respectfully submits that the Court should deny the Motion to Dismiss and/or affirm, take jurisdiction of this case and set it for oral argument and the filing of briefs.

Respectfully submitted,

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919—18th Street, N. W.
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Counsel for Appellants

CERTIFICATE OF COUNSEL

I, MICHAEL G. KUSHNICK, one of the attorneys for Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1976, I served copies of the foregoing Appellants' Response to Rule 16 Motion to Dismiss and/or Affirm on the several parties thereto as follows:

1. On William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

Mallory Horton, Esquire, Horton and Perse
410 Concord Building, Miami, Florida 33130
Paul E. Sawyer, County Attorney for Monroe County
P. O. Box 571, Key West, Florida 33040

2. On the State of Florida, by mailing a copy in a duly addressed envelope with first class postage prepaid, to its attorney of record as follows:

Tom Harris, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol—Department of Legal Affairs
Tallahassee, Florida 32304

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